

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-06

**SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ
CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and
SYLVIA ROBLEDO d/b/a 81ST DOLPHIN PARKING**

v.

**THE BOARD OF TRUSTEES OF THE GALVESTON
WHARVES and THE GALVESTON PORT FACILITIES
CORPORATION**

**RESPONDENTS THE GALVESTON WHARVES AND THE GALVESTON PORT
FACILITIES CORPORATION'S CORRECTED RESPONSE AND OPPOSITION TO
COMPLAINANTS' PROPOSED FINDINGS OF FACT**

The Board of Trustees of the Galveston Wharves ("Wharves") and the Galveston Port Facilities Corporation ("GPFC"), respondents in the above entitled and numbered cause, by and through their attorneys, Anthony P. Brown and Wm. Hulse Wagner, file the following Corrected opposition, exceptions, objections and rebuttal to the following Proposed Findings of Fact proffered by Complainants:

Dated: June 1, 2015

I. OBJECTIONS TO COMPLAINANTS' APPENDIX

Respondents object to the following documents proffered by Complainants in support of their Proposed Findings of Fact :

- a. App 000768. Certification Summary (Appendix Item 44) – This certification is executed by Allison Fine, the legal assistant for Complainants counsel. Nothing presented or proffered supports any qualifications of this individual to prepare financial summaries

and proffer them as admissible evidence. Furthermore, the proffered transcript has not been properly authenticated as required by Fed. R. Evid. 902.

- b. In addition to Ms. Fine's lack of qualifications to make such a summary of the documents, the Summary of Access Fees billed (Appendix Item 45) created by Ms. Fine contains a number of inaccuracies. One example is that Ms. Fine's chart reflects that Z-Limo accessed the terminal thirteen (13) times in 2014 for a total of \$180.00 in charges. Z-Limo accessed the port forty seven (47) times in 2014 for a total of \$930.00. (Comp. App. 1970, pg. 1971-1978; BOT_017463-70). A second example as to inaccuracy of the summary is the fact that some of the invoices are not included in the summary, such as AIM Limo Services.
- c. Complainants also rely upon transcriptions evidently prepared by Ms. Fine. (Comp. App. 418 and 534). As stated above, Complainants have not presented any evidence which supports Ms. Fine's qualifications to prepare and transcribe the relied upon documents and proffer them as admissible evidence. Furthermore, the proffered transcripts have not been properly authenticated as required by Fed. R. Evid. 902.

II. OPPOSITION AND RESPONSE TO COMPLAINANTS' PROPOSED FINDINGS OF FACT

1. Complainant Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking ("EZ Cruise") is a for-profit corporation organized and existing under the laws of the State of Texas, incorporated on December 2, 2003. (Complainants' First Amended Verified Complaint at p.2 (ALJ App. 1)).

Response: Admitted.

2. EZ Cruise owns and operates a private parking lot facility located at 2727 Santa Fe Pl., Galveston, Texas 77550, approximately five (5) blocks from the Port of Galveston Cruise Terminal. EZ Cruise owns and operates (with commercially certified drivers where necessary) eight (8) shuttle buses to transport passengers with their luggage directly to and from the terminal. *Id.* at pp. 2-3.

Response: Respondents do not have enough information to either confirm or deny the “commercially certified” status of Complainant EZ Cruise’s drivers. Otherwise, admitted.

3. From 2006 through April of 2011, EZ Cruise maintained 320 parking spaces. (Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008) at BOT 006374 – 76 (ALJ App. 35), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at BOT 007126 – 28 (ALJ App. 38), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2010) at BOT 007895 – 97 (ALJ App. 41), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) at 008617 – 18 (ALJ App. 44)).

Response: Respondents object to this Proposed Finding of Fact because as originally written, Complainants did not provide any citation for their proposed finding. Respondents further object to Complainants’ proposed finding because it incorrectly implies that Complainant was billed for all available spaces. Respondents object to the use of the term “maintained” because it is vague and ambiguous in the context written. Subject to and without waiving these objections, Respondents admit that Complainant EZ Cruise was billed for 320 parking spaces from 2006 through April of 2011.

4. From January of 2008 through April of 2011, EZ Cruise paid \$102,400.00 of the \$352,423.58 total Access Fees collected by the Wharves Board. *Id.*

Response: Respondents object to this proposed finding because it incorrectly implies that all assessed access fees were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Subject to and without waiving this objection, Respondents admit that Complainant EZ Cruise Parking paid \$102,400.00 of the total \$352,423.58 Access Fees collected by the Wharves Board from January 2008 through April 2011.

5. From May of 2011 through October of 2011, EZ Cruise maintained 220 parking spaces and paid \$10,560.00 of the \$42,850.00 total Access Fees collected by the Wharves Board. (Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016146 - 51 (ALJ App. 58); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) at BOT 008618 – 19 (ALJ App. 44)).

Response: Respondents object to this proposed finding because it incorrectly implies that all assessed access fees were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Respondents object to the use of the term “maintained” because it is vague and ambiguous in the context written. Subject to and without waiving these objections, Respondents admit that Complainant EZ Cruise was billed for 220 parking spaces from May 2011 through October of 2011. Respondents further admit that Complainant EZ Cruise Parking paid \$10,560.00 of the total \$42,850.00 Access Fees collected by the Wharves Board from May 2011 through October 2011.

6. In November of 2011, EZ Cruise’s passenger parking capacity returned to 320 spaces, which remained the same until October of 2012. (Invoices – Galveston Wharves (EZ

Cruise Parking) at BOT 016152 - 63 (ALJ App. 58); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) at BOT 008619 (ALJ App. 44), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2012) at BOT 009370 – 72 (ALJ App. 47)).

Response: Respondents object to this proposed finding because it incorrectly implies that all assessed access fees were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Respondents object to the use of the term “parking capacity” because it is vague and ambiguous in the context written. Subject to and without waiving these objections, Respondents admit that Complainant EZ Cruise was billed for 320 parking spaces from November 2011 through October of 2012.

7. During that period, EZ Cruise paid \$30,720.00 of the \$127,750.00 total Access Fees collected by the Wharves Board. *Id.*

Response: Respondents object to this proposed finding because it incorrectly implies that all assessed access fees were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Subject to and without waiving this objection, Respondents admit that Complainant EZ Cruise Parking paid \$30,720.00 of the total \$127,750.00 Access Fees collected by the Wharves Board from November 2011 through October 2012.

8. From November of 2012 through June of 2014, EZ Cruise maintained a parking space count of 380 spaces and paid \$62,400.00 of the \$262,891.00 total Access Fees collected by the Wharves Board. (Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016164 - 87 (ALJ App. 58); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2012) at BOT 009372 (ALJ App. 47); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2013) at BOT 010134 – 37 (ALJ App. 50), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2014) at BOT 010607 – 10 (ALJ App. 54)).

Response: Respondents object to Complainants’ proposed finding because it incorrectly implies that Complainant was billed for all available spaces. Furthermore, contrary to Complainants’ proposed finding; Complainants Verified Petition alleges that Complainant EZ Cruise’s parking lot has a maximum capacity of 413. (Complainants’ First Amended Verified Complaint at p. 2 (Comp. App. 1)). Respondents object to this proposed finding because it incorrectly implies that all assessed access fees were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Subject to and without waiving these objections, Respondents admit that Complainant EZ Cruise was billed for 380 parking spaces from November 2012 through June 2014. Respondents further admit that Complainant EZ Cruise Parking paid \$62,400.00 of the total \$262,891.00 Access Fees collected by the Wharves Board from November 2012 through June 2014.

9. Additionally, during that time period, EZ Cruise added “overflow” parking, adding 50 parking spaces for four months during the same time period. (Invoices – Galveston Wharves (EZ Cruise Parking) at BOT 016166, 016168, 016171, and 016174 (ALJ App. 58)).

Response: Admitted.

10. Lighthouse Complainant Lighthouse Parking, Inc. (“Lighthouse”) is a for-profit corporation organized and existing under the laws of the State of Texas, incorporated on May 27, 2005. (Complainants’ First Amended Verified Complaint at p. 3 (ALJ App. 1)).

Response: Admitted.

11 Lighthouse owns and operates a private fully covered parking lot facility located at 309 29th St, Galveston, Texas 77550, approximately seven (7) blocks from the Port of Galveston Cruise Terminal. Lighthouse owns and operates (with commercially certified drivers where necessary) four (4) shuttle buses to transport passengers with their luggage directly to and from the terminal. *Id.*

Response: Respondents do not have enough information to either confirm or deny the “commercially certified” status of Complainant Lighthouse’s drivers. Otherwise, admit.

12. From 2006 through December of 2013, Lighthouse maintained 190 parking spaces. (Invoices – Galveston Wharves (Lighthouse Cruise Parking) at BOT 016705 – 77 (ALJ App. 141); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008) at BOT 006374 – 76 (ALJ App. 35), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at BOT 007126 – 28 (ALJ App. 38), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2010) at BOT 007895 – 97 (ALJ App. 41), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) at BOT 008617 – 19 (ALJ App. 44), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2012) at BOT 009370 – 72 (ALJ App. 47), and Galveston Wharves Historical Detailed Trial Balance, Access Fees (2013) at BOT 010134 - 37 (ALJ App. 50)).

Response: Respondents object to this Proposed Finding of Fact because as originally written, Complainants did not provide any citation for their proposed finding. Respondents object to this proposed finding because it incorrectly implies that all assessed access fees were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Respondents object to the use of the term “maintained” because it is vague and ambiguous. Furthermore, contrary to Complainants’ assertion, Complainant Lighthouse operated and paid access fees for a second lot containing between 20 and 25 parking spaces from December 2011 until March 2012. Invoices—Lighthouse Parking, BOT_016752-016756 (Comp. App. 141, pgs. 188-192). Subject to and without waiving these objections, Respondents admit that Complainant Lighthouse was billed for 190 parking spaces from August of 2006 through November of 2011 and April 2012 through December 2013. Invoices—Lighthouse Parking, BOT_016687-016750 (Resp. App. Tab. No. 34, pgs. 1609-1672; BOT_16757-016777 (Comp. App. 141, pgs.193-213).

13. From January of 2008 through December of 2013, Lighthouse paid \$109,440.00 of the \$691,827.58 total Access Fees collected by the Wharves Board. *Id.*

Response: Response: Respondents object to this proposed finding because the documents cited show the amount of Access Fees billed, not collected during the referenced period. Subject to and without waiving these objections, Respondents admit that Complainant Lighthouse Parking paid \$106,798.88 of the total \$691,827.38 Access Fees collected by the Wharves Board from January through December of 2013.

14. From January of 2014 through April of 2014, Lighthouse maintained 207 parking spaces and paid \$6,424.00 of the \$64,420.00 total Access Fees collected by the Wharves Board. (Invoices – Galveston Wharves (Lighthouse Cruise Parking) at BOT 016778 – 83 (ALJ App. 141); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2014) at BOT 010607 - 09 (ALJ App. 54)).

Response: Respondents object to Complainants' proposed finding because it incorrectly implies that Complainant was billed for all available spaces. Respondents object to this proposed finding because it incorrectly implies that all assessed access fees were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Respondents object to the use of the term "maintained" because it is vague and ambiguous in the context written. Subject to and without waiving these objections, Respondents admit that Complainant Lighthouse was billed for 207 parking spaces from February 2014 through April of 2014. Invoices- Lighthouse Parking, BOT_016779-016781 (Comp. App. 141, pgs. 215-217). In January of 2014, Complainant Lighthouse was billed for 182 spaces. Invoices- Lighthouse Parking, BOT_016778 (Comp. App. 141, p. 214). Respondents further admit that Complainant Lighthouse paid \$6,424.00 of the total \$64,420.00 Access Fees collected by the Wharves Board from May 2011 through October 2011.

15. From May of 2014 through June of 2014, Lighthouse maintained 220 parking spaces and paid \$3,520.00 of the \$29,667.00 total Access Fees collected by the Wharves Board. (Invoices – Galveston Wharves (Lighthouse Cruise Parking) at BOT 016782-83 (ALJ App. 141); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2014) at BOT 010609 - 10 (ALJ App. 54)).

Response: Respondents object to Complainants' proposed finding because it incorrectly implies that Complainant was billed for all available spaces. Furthermore, contrary to Complainants' proposed finding; Complainants Verified Petition alleges that Complainant Lighthouse's parking lot has a maximum capacity of 230. Complainants' First Amended Verified Complaint at p. 3 (Comp. App. 1). Respondents object to the use of the term "maintained" because it is vague and ambiguous in the context written. Respondents object to this proposed finding because it incorrectly implies that all assessed access fees were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Subject to and without waiving these objections, Respondents admit that Complainant Lighthouse was billed for 220 parking spaces from May of 2014 through June 2014. (BOT_016783-016785, Comp. App. 141, pgs. 219-221).

Respondents further admit that Complainant Lighthouse paid \$3,520.00 of the total \$29,667.00 Access Fees collected by the Wharves Board from May of 2014 through June 2014.

16. Complainant Sylvia Robledo d/b/a 81st Dolphin Parking (“81st Dolphin”), is a natural person who is a citizen and resident of the State of Texas. (Complainants’ First Amended Verified Complaint at p. 3 (ALJ App. 1)).

Response: Respondents admit that Ms. Robledo is a natural person doing business under the name 81st Dolphin, but can neither admit nor deny her citizenship or residency status.

17. 81st Dolphin commenced doing business in May 2009. *Id.*

Response: Denied. In her deposition testimony, Complainant Robledo testified that 81st Dolphin commenced doing business in 2006 through a lease agreement with Aslam Kapadia. Depo. S. Robledo at 10:9 – 10:11 (Resp. App. Tab. No. 80 at p. 2296).

18. In doing business as 81st Dolphin, Ms. Robledo individually leases and operates a private parking lot facility located at 2801 Market St. Galveston, Texas 77550, approximately six (6) blocks from the Port of Galveston Cruise Terminal. *Id.*

Response: Respondents admit that Ms. Robledo has leased the referred facility since August of 2009, but deny that she has leased it for the entirety of 81st Dolphin’s existence. *Id.*

19. 81st Dolphin leases and operates (with commercially certified drivers where necessary) three (3) shuttle buses to transport passengers with their luggage directly to and from the terminal. *Id.* at pp. 3-4.

Response: Respondents do not have enough information to either confirm or deny the “commercially certified” status of Complainant 81st Dolphin’s drivers. Otherwise, admit.

20. From 2006 through May of 2009, 81st Dolphin maintained 120 parking spaces. (Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008) at BOT 006374 – 76 (ALJ App. 35), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at 007126 – 27 (ALJ App. 38)).

Response: Respondents object to this Proposed Finding of Fact because as originally written, Complainants did not provide any citation for their proposed finding. Respondents object to Complainants’ proposed finding because it incorrectly implies that Complainant was billed for all available spaces. Respondents also object to their term “maintained” because it is vague and ambiguous in the context written. Respondents also object to this proposed finding because it incorrectly assumes that all access fees assessed were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Subject to and without waiving these objections, Respondents

admit that Complainant 81st Dolphin was billed for 120 parking spaces from August of 2006 through May of 2009. Invoices- Aslam Kapadia BOT_015796-0015830 (Resp. App. Tab. No. 31, pgs. 1572-1606).

21. From January of 2008 to May of 2009, 81st Dolphin paid \$16,320.00 of the total \$158,276.52 the Wharves Board collected in Access Fees.

Response: Respondents object to this proposed finding because it incorrectly assumes that all access fees assessed were collected. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Subject to and without waiving this objection, Respondents admit that Complainant 81st Dolphin paid \$16,320.00 of the total \$158,276.52 Access Fees collected by the Wharves Board from January of 2008 through May of 2009.

22. 81st Dolphin did not operate a parking lot from June to August of 2009. (Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at BOT 007126 - 28 (ALJ App. 38)).

Response: Admitted.

23. From September of 2009 through December of 2013, 81st Dolphin maintained 50 parking spaces and paid \$20,800.00 of the \$512,081.06 total Access Fees collected by the Wharves Board. (Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) at BOT 007127 - 28 (ALJ App. 38), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2010) at BOT 007895 - 97 (ALJ App. 41), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) at BOT 008617 - 19 (ALJ App. 44), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2012) at BOT 009370 - 72 (ALJ App. 47), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2013) at BOT 010134 - 37 (ALJ App. 50)); *see also* (Invoices - Galveston Wharves (81st Dolphin) at BOT 015739 - 78 (ALJ App. 220)).

Response: Respondents object to this proposed finding because it incorrectly implies that Complainant was billed for all available spaces. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Respondents also object to their term "maintained" because it is vague and ambiguous in the context written. Respondents also object because in the case of Complainant 81st Dolphin, and in particular, Robledo was billed for 50 spaces at her request, although the maximum capacity of the lot that she leased was always 135. Depo. S. Robledo at 67:6 - 68:3 (Resp. App. Tab. No. 80 at P. 2324); Complainants' First Amended Verified Complaint at p. 3 (Comp. App. 1). Subject to and without waiving these objections, Respondents admit that Complainant 81st Dolphin was billed for 50 parking spaces from September of 2009 through December of 2013. Invoices- 81st Dolphin, BOT_015739-015778 (Comp. App. 220, pgs. 225-264). Respondents further admit that Complainant 81st Dolphin paid \$20,800.00 of the total \$512,081.06 Access Fees collected by the Wharves Board from September of

2009 through December of 2013. Invoices- Detail Historical Aged Trial Balance for 81st Dolphin BOT_015734-015738 (Comp. App. 220, pgs. 220-224).

24. From January of 2014 through July of 2014, 81st Dolphin maintained a total of 96 parking spaces and paid \$4,608.00 of the \$94,087.00 total Access Fees collected by the Wharves Board. (Galveston Wharves Historical Detailed Trial Balance, Access Fees (2014) at BOT 010607 – 10 (ALJ App. 54); Invoices – Galveston Wharves (81st Dolphin) at BOT 015779 – 015785 (ALJ App. 220)).

Response: Respondents object to this proposed finding because it incorrectly implies that Complainant was billed for all available spaces. Port of Galveston Delinquent Accounts Receivable Analysis, BOT_014739-014867 (Resp. App. Tab. No. 60 p. 1792). Respondents also object to their term “maintained” because it is vague and ambiguous in the context written. Respondents also object because in the case of Complainant 81st Dolphin, in particular, Robledo was billed for fewer spaces at her request, although the maximum capacity of the lot that she leased was always 135. Depo. S. Robledo at 67:6 – 68:3 (Resp. App. Tab. No. 80 at p. 2324); Complainants’ First Amended Verified Complaint at p. 3 (Comp. App. 1). Subject to and without waiving this objection, Respondents admit that Complainant 81st Dolphin was billed for 96 parking spaces from January of 2014 through July of 2014. Invoices- 81st Dolphin, BOT_015779-015785 (Comp. App. 220, pgs. 265-271). Respondents further admit that Complainant 81st Dolphin paid \$4,608.00 of the total \$94,087.00 Access Fees collected by the Wharves Board from January of 2014 through July of 2014. Detail Historical Aged Trial Balance for 81st Dolphin BOT_015734-015738 (Complainants’ ALJ App. 220).

25. Currently, at maximum capacity, 81st Dolphin’s lot can accommodate approximately 135 vehicles. (Invoices – Galveston Wharves (81st Dolphin) at BOT 015736, BOT 015786 -88 (ALJ App. 220)).

Response: Respondents object to this proposed finding because the documents cited herein, page 2 of a multi-paged Historical Trial Balance and invoices for the months of August and September of 2014 showing billing for 135 spaces do not demonstrate the maximum capacity of Complainant 81st Dolphin’s parking lot. Invoices- Detail Historical Aged Trial Balance for 81st Dolphin, BOT_015736 (Comp. App. 220) and Access Fee Invoices for 81st Dolphin BOT_015786-015788 (Comp. App. 220). Respondents do not have enough information to either admit or deny that Complainant 81st Dolphin’s lot can accommodate approximately 135 vehicles.

26. Respondent The Board of Trustees of the Galveston Wharves (the “Wharves Board”) has been authorized by the City of Galveston to manage and control the Port of Galveston’s wharf and terminal facilities. GALVESTON, TEX., CHARTER, art. XII, §§ 1-2 (designating Galveston Wharves as a “separate utility” of the City of Galveston to be

managed by the Board of Trustees of the Galveston Wharves) (ALJ App. 278).

Response: Respondents object to this proposed finding of fact to the extent it is an incomplete statement. The wharf and terminal properties purchased by the City of Galveston were set apart and designated as a separate utility of the city - thus the name "Galveston Wharves." The Wharves Board of Trustees is authorized by the City of Galveston to manage, control, maintain and operate the Galveston Wharves. GALVESTON, TEX., CHARTER, art. XII, §§ 1-2 (Comp. App. 278) and Chapter 54 of the Texas Transportation Code (Comp. App. 283). Otherwise, admitted.

27. The City of Galveston is a municipality that owns and operates a port, and therefore, the State has accorded the Board of Trustees with the power to "construct, acquire, lease, improve, enlarge, extend, repair, maintain, replace, develop, or operate a port improvement or facility." TEX. TRANSP. CODE § 54.003(a) (ALJ App. 283).

Response: Admitted.

28. In furtherance thereof, the Wharves Board publishes rules, regulations, and tariffs for the Port of Galveston. (Complainants' First Amended Verified Complaint at p. 4 (ALJ App. 1)).

Response: Respondents object because Complainants improperly cite to their own Petition as support of their findings. The power to issue rules and regulations and tariffs is derived from GALVESTON, TEX., CHARTER, art. XII, § 4 (Powers of the Board)(Comp. App. 278) Chapter 54 of the TEX. TRANSP. CODE (Comp. App. Tab 13 p. 283), as well as general provisions of the Shipping Act of 1984.

29. Respondent Galveston Port Facilities Corporation ("GPFC") is a nonprofit corporation organized and existing under the laws of the State of Texas, incorporated on June 17, 2002. TEX. TRANSP. CODE § 431.101(a) (ALJ App. 284).

Response: Admitted to the extent that this sentence is factually accurate. However, Respondent objects because the description of the GPFC is factually incomplete and this incompleteness is a deliberate attempt to mislead the Judge as to the actual role of the GPFC.

The GPFC was created by the City of Galveston under City Resolution No. 02-022. The resolution approved the form of the GPFC's Articles of Incorporation and was adopted by the City Council of the City on June 13, 2002. (Comp. App. 287, p. 288).

Further, under Texas law a "nonprofit" corporation is actually incorporated under a different statute than the Transportation Code. Generally, nonprofit corporations are governed by the terms of Chapter 22 of the Texas Business Organizations Code. The Transportation Code limits the applicability of the nonprofit corporation rules as follows:

Sec. 431.006. APPLICATION OF TEXAS NON-PROFIT CORPORATION ACT.
The Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas

Civil Statutes) applies to a corporation to the extent that the provisions of that Act are not inconsistent with this chapter.

Tex. Transp. Code Sec. 431.006. (Resp. App. Tab. No. 70 p. 1947).

Under the Texas Transportation Code:

(a) A local government corporation is a governmental unit as that term is used in Chapter 101, Civil Practice and Remedies Code.

(b) The operations of a local government corporation are governmental, not proprietary, functions.

Tex. Transp. Code Sec. Sec. 431.108. (Resp. App. Tab. No. 73 p. 1950).

Further, at any time the local government creating the corporation can assume all of its powers and duties as well as its assets:

Sec. 431.104. ASSUMPTION OF POWERS AND DUTIES. (a) The governing body of a local government may assume for the local government the powers and duties of a local government corporation created by the local government.

(b) A local government that assumes the powers and duties of a local government corporation assumes the assets and liabilities of the corporation.

Tex. Transp. Code Sec. 431.104. (Resp. App. Tab. No. 71 p. 1948).

Also, Chapter 22 of the Texas Business Organizations Code generally does not allow any distributions to members or third parties to have the right to own the income and assets of a nonprofit corporation. Sec. 431.107(a) of the Texas Transportation Code expressly states that

(a) A local government creating a local government corporation is entitled at any time to receive any income earned by the local government corporation that is not needed to pay the corporation's expenses or obligations.

Tex. Transp. Code Sec. 431.107(a). (Resp. App. Tab. No. 72 p. 1949).

The Articles of Incorporation mirrors these statutory provisions. Article XII of GPFC's Articles of Incorporation expressly states the following:

The Wharves, a utility of the City, shall at all times have an unrestricted right to receive any income earned by the Corporation, exclusive of amounts needed to cover reasonable expenditures and reasonable reserves for future activities.

If the Board of Directors determines by resolution that the purposes for which the Corporation was formed have been substantially met and all bonds issued by and all obligations incurred by the Corporation have been fully paid, the Board shall execute a certificate of dissolution which states those facts and declares the Corporation dissolved in accordance with the requirements of Section 394.026 of Texas Local Government Code, or with applicable law then in existence. In the event of dissolution or liquidation of the Corporation, all assets will be turned over to the Wharves. (Comp.App.286, pg. 289).

As allowed under Texas law and its Articles of Incorporation, the Board of Directors of the GPFC consists of the entire Board of Trustees of the Galveston Wharves, plus two independent board members chosen by the Trustees. (Deposition of Mark Murchison 19:18-22, Resp. App. Tab. No. 79 p. 2258; GPFC Articles of Incorporation, Article VI, Comp. App. 286, p. 287; Affidavit of Michael Mierzwa ¶7, Resp. App. Tab. No. 75 p. 2071).

The Officers of the GPFC are also the officers of the Galveston Wharves. (Deposition of Michael Mierzwa 9:24-10:5., Resp. App. Tab. No. 79 p. 2182; Deposition of Murchison 11:24-5, 12:1-7, Resp. App. Tab. No. 79 p. 2251).

The GPFC has no employees. Its obligations are performed by employees of the Wharves. (Affidavit of Michael Murchison ¶4, Resp. App. Tab. No. 77 at p. 2081; and Affidavit of Michael Mierzwa ¶8, Resp. App. Tab. No. 75 at p. 2072).

All Galveston Wharves employees involved in the management and operations of the cruise terminal are employees of the Board of Trustees of the Galveston Wharves. (Affidavit of Michael Mierzwa, ¶10, Resp. App. Tab. No. 75 at p. 2071).

For this reason, for accounting and budgeting purposes, even though the GPFC is technically a separate entity, it is not “independent” of the Board of Trustee of the Galveston Wharves. It is considered a blended financial component of the Galveston Wharves and it’s accounting reports are prepared on a consolidated basis with those of the Wharves. The Galveston Wharves’ auditors and expert witness Jeffrey Compton, CPA agree that failing to report the GPFC on a consolidated basis with the Galveston Wharves would be misleading or incomplete. (Port of Galveston Comprehensive Financial Reports (CAFRs) BOT013986, 014123, 014231, 014303, 014539, 014567, Resp. App. Tab. Nos. 9, pg. 825, Tab. No. 12, pg. 1005, Tab. No. 13, pg. 1077, Tab. No. 16, pgs. 1326, 1354); Affidavit and Report of Jeffrey Compton, ¶¶18, 19 and 28, Resp. App. Tab. No. 7 at p. 404 and Tab No. 103 at p. 2759; Deposition of Murchison 15:11-25, 16:1-8, Resp. App. Tab. No. 79 p. 2255).

30. GPFC is a “local government corporation” charged with assisting the Board of Trustees with its governmental functions. TEX. TRANSP. CODE § 431.101(a) (ALJ App. 284).

Response: Respondent objects to the term “charged” as it is vague and ambiguous in the context used. Admit that acting on behalf of the City by assisting the City's utility is one of

the functions of the GPFC but denies that this is its only function. GPFC was created for the purpose of facilitating financing, construction, and operation of the Wharves' Cruise Terminal facility (Affidavit of Mark Murchison, ¶4, Resp. App. Tab. No. 77 p. 2081).

31. GPFC is organized and will be operated exclusively for one or more charitable purposes, within the meaning of Section 501(c)(3) of the U.S. Internal Revenue Code of 1986, as amended. (Articles of Incorporation of Galveston Port Facilities Corporation (ALJ App. 286); Depo. M. Mierzwa at 10:19 – 12:3 (ALJ App. 293)).

Response: Admitted to the extent that this sentence is factually accurate. However, Respondent objects because the description of the GPFC is factually incomplete and this incompleteness is a deliberate attempt to mislead the Judge as to the actual role of the GPFC. Respondent also objects to the Complainants' mischaracterization of deposition testimony described in Comp. App. 293 because it is not factually correct At page 10 of the Mr. Mierzwa's deposition he does not provide testimony reciting the language of PPF No. 31. Instead he states that:

The purpose of the Galveston Port Facilities Corporation was to facilitate the Port's ability to construct terminals or do cruise terminal improvements in a more expeditious manner. . . .

Depo. M. Mierzwa at 10:15-19 (Comp. App. 293).

This purpose is consistent with IRS Guidance relating to 501(c)(3) organizations:

A state or municipal instrumentality may qualify under section 501(c)(3) if it is organized as a separate entity from the governmental unit that created it and if it otherwise meets the organizational and operational tests of section 501(c)(3). Examples of a qualifying instrumentality might include state schools, universities, or hospitals.

<http://www.irs.gov/publications/p557/ch03.html> (Resp. App. Tab. No. 84 p. 2556).

For financial reporting purposes, the GPFC is treated as a blended component unit of, and consolidated with, the Port of Galveston. According to the notes to the financial statements, the nature and significance of GPFC's relationship with the primary government entity (*i.e.* Port of Galveston) is such that exclusion would cause the reporting entity's financial statements to be misleading or incomplete without the inclusion of GPFC. Separate financial statements for GPFC are not prepared. (Affidavit and Report of Expert Jeff Compton, ¶19 (Resp. App. Tab. No. 7 at p. 404 and Tab No. 103 at p. 2760).

32. GPFC functions independently as a tenant of the Wharves Board and the Cruise Terminal's operator, and is responsible for any obligations that are owed to the cruise lines with respect to running the Cruise Terminal. (Depo. M. Mierzwa at 33:7 – 34:6 (ALJ App. 293)).

Response: Denied. Respondent disputes this statement and the references cited therein as factually and legally inaccurate. Respondent also objects to the deposition testimony described in Comp. App. 293 because it is not factually correct. Respondent incorporates its response to Complainants' Proposed Finding of Fact No. 25.

The testimony found at Depo. M. Mierzwa at 33:7 – 34:6 (Comp. App. 293) does not state that the GPFC “functions independently as a tenant of the Wharves Board” as stated. In fact the phrase “functions independently” was not used by Mr. Mierzwa nor implied by his testimony.

A more accurate and complete factual description of the GPFC's duties, powers and relationship to the Galveston Wharves is as follows:

- 1. The Galveston Port Facilities Corporation is a local government corporation under Article 431 of the Texas Transportation Code. Tex. Trans. Code Sec. 431.001, et. seq. Comp. App. Tab 14 p. 285, GPFC Articles of Incorporation, Comp. App. 286; Affidavit of Mark Murchison, ¶ 9, Resp. App 77 at p. 2083).**
- 2. This chapter of the Texas Transportation allowed the City of Galveston and the Galveston Wharves to create an entity to help with financing of a transportation facility. The GPFC is a governmental unit and its operations are governmental functions. *Id.* at Sec. 431.108 (Resp. App. Tab 73 p. 1950).**
- 3. The GPFC also qualifies as a tax exempt entity under 501(c)(3) of the Internal Revenue Code of 1986, as amended. (Comp. App. 00286, GPFC Articles of Incorporation).**
- 4. The Board of Trustees has the power to assume the powers of the GPFC at any time. (Tex. Trans. Code 431.104 Resp. App. Tab 71 at p. 1948, and Comp. App. 286, pg. 289, Article XII of the GPFC Articles of Incorporation).**
- 5. In so assuming, the Board of Trustees would also assume the assets and liabilities of the GPFC. *Id.***

6. **The Galveston Wharves has the power to receive all income earned by the GPFC.**
Id.

7. **GPFC does not issue or enforce tariffs. GPFC does not assess or collect access fees.**
(Affidavit of Mark Murchison, ¶¶ 10, 11, Resp. App. Tab No. 77 at p. 2083).

8. **For accounting purposes, the income, expenses, assets and liabilities of the GPFC are reported on a consolidated basis with those of the Wharves.** (Resp. App. Tab Nos. 9, 12, 13, and 16) **Port of Galveston Comprehensive Financial Reports (CAFRs) BOT013986, 014123, 014231, 014303, 014539, 014567; Affidavit and Report of Jeffrey Compton, ¶¶ 18, 19 and 28, Resp. App. Tab No. 7 at p. 404 and Tab. No. 103 at p. 2759; Deposition of Murchison 15:11-25, 16:1-8, Resp Tab No. 79 at p. 2255-2256).**

9. **The Wharves leases the cruise terminal to the GPFC.** (Affidavit of Michael Mierwza ¶9, Resp. App. Tab. No. 75 at p. 2071; Deposition of Michael Mierwza, Comp. App. 298).

10. **The Wharves has the right to receive all income of the GPFC above the amounts needed to cover expenses.** (Affidavit of Jeff Compton, ¶11, Resp. App. Tab. No. 103 at p. 2758).

11. **The GPFC does not function as an independent tenant of the Port.**

33. GPFC obtains revenue by collecting passenger wharfage, dockage, and cargo wharfage from cruise lines. *Id.* at 15:8 – 19:13, 42:17 – 43:6, and 86:23-24.

Response: Respondents object because this is a mischaracterization of the testimony proffered for proof. The deposition testimony at 15:8-19 is merely reciting language from Section 3.02 (Comp. App. 318) of a Lease Agreement attached as Exhibit 1 to Mr. Mierwza's deposition. (Id. at 317), describing ground rent for Cruise Terminal No. 2. It is not a recitation of GPFC's sources of income and cannot be used as such.

34. GPFC's only source of revenue are the agreements it has with cruise lines. *Id.*

Response: Objection. This proposed finding mischaracterizes the testimony proffered for proof the language referenced in the testimony of Mr. Mierzwa. Further, Mr. Mierzwa noted repeatedly in his testimony that he was neither familiar with the specific terms of these agreements and could not provide any legal interpretation of the agreements. Subject to that objection, Respondents admit that the sole source of revenue for the GPFC is derived from its agreements with the cruise lines that call on the Port at Cruise Terminals No. 1 and 2.

35. GPFC does not charge anyone fees to access the Cruise Terminal. *Id.* at 23:5 – 24:16 and 36:9-15.

Response: Objection. This proposed finding mischaracterizes the testimony proffered for proof. The language referenced in the testimony of Mr. Mierzwa, pg. 23:5-24:16 merely states that the GPFC doesn't charge contractors such as waste management to access the cruise terminal. It does not describe the sources of income for the GPFC.

Subject to that objection, Respondents' admit that GPFC does not charge access fees.

36. Wharves Board operates parking facilities which account for 68% of the parking spaces available for cruise passenger parking, not inclusive of hotels/motels that provide parking for cruise passengers. *Id.* at 141:8 – 142:7, 151:23 – 152:2.

Response: Objection. This proposed finding is misleading, mischaracterizing testimony and irrelevant. The specific citation proffered to support this fact is improperly referenced and misleading to create an untrue statement. The interchange between Mr. Mierzwa and Complainants' counsel involved the counsel reading from a document discussed as Exhibit 9 to Mr. Mierzwa's deposition (introduced for the deposition at Comp. App. 310). Mr. Mierzwa was then asked questions as to his interpretations of what the counsel claimed to be reading at the time. Mr. Mierzwa was asked about a statement in 2014, relating to a parking review by Port Staff in May of 2014 and how those particular percentages were determined at that time. *Id.* Thus, the percentage of the available parking spaces attributable to the Wharves, as stated in the proposed Finding, is correct as of the date of that review.

The proposed finding suggests that for all times relevant to this proceeding, the percentages stated were in effect, so that Complainant can then attempt to use those to bolster their reparation claim. However, there is no evidence of any kind that these percentages were in effect for all times relevant. The May 2014 count was done at a particular time and can only be considered in effect for that particular time period. Further, that count was done for a study involving the May 2014 Tariff amendment related to the \$28.88 space per month access fee which was never put into effect and is thus not relevant to this proceeding.

37. Respondent GPFC performs the functions of a marine terminal operator. *Id.* at 16:2 – 17:12, 33:10-25.

Response: Admitted that the GFPC performs some of the functions of a terminal operator; however, as noted above the GFPC does not issue or enforce tariffs and does not assess or collect access fees for the cruise terminals. (Affidavit of Michael Mierzwa ¶¶ 10, 11, Resp. App. Tab. No. 75 at p. 2071).

38. The relationship between Respondent Wharves Board and Respondent GPFC is solely that of landlord and tenant and is not a partnership or joint venture. (Lease Agreement between The Board of Trustees of the Galveston Wharves and Galveston Port Facilities Corporation, dated December 23, 2007, at p.12, sec. 17.02 (ALJ App. 398); Depo. M. Mierzwa at 45:1-20, 83:3- 6 (ALJ App. 293)).

Response: Objection. This is factually and legally incorrect and misstates Mr. Mierzwa's testimony. Respondent references and incorporates its responses to Proposed Findings of Fact Nos. 27-31 which fully describes the factual and legal status and relationship between GPFC and the Board of Trustees of the Galveston Wharves.

When asked to provide an interpretation of this relationship, the question being subject to an objection on the grounds it called for a legal opinion, Mr. Mierzwa testified that

My general understanding is there is that relationship that exists in 17.02 but I will tell you I'm not an attorney and I'm not sure what all the provisions are, of a partnership or joint venture are; and, so, I can't really comment on that.

Depo. M. Mierzwa at 45:1-17 (Comp. App. 302).

Respondents admit that a lease exists between the two relating to Cruise Terminal No. 1, however, this lease does not alter the legal status of GPFC under Texas law.

39. Respondent GPFC pays rent to Wharves Board pursuant to a lease for the property it operates. (Depo. M. Mierzwa at 40:4-10 (ALJ App. 293)).

Response: Objection, this proposed finding is incomplete and misleading as it attempts to falsely bolster Complainants factually and legally incorrect argument that the GPFC and the Wharves are completely separate and the GPFC is the same as any private tenant of the Port. Respondent references and incorporates its responses to Proposed Findings of Fact Nos. 27-31 which fully describes the factual and legal status and relationship between GPFC and the Board of Trustees of the Galveston Wharves.

With regard to the management of the cruise terminals, Respondents admit that GPFC and the Port have a Lease and Development Agreement relating to Cruise Terminal No. 1 and a Lease Agreement relating to Cruise Terminal No. 2. Both require GPFC to give their revenue to Wharves in the form of rent.

40. Mr. Michael Mierzwa is the port director for Respondent Wharves Board a/k/a The Board

of Trustees of the Galveston Wharves a/k/a The Port of Galveston, and is the president of Respondent GPFC. *Id.* at 6:8-14, 21-25.

Response: Admitted that Mr. Michael Mierwza is the current Port Director of the Port of Galveston which is managed and operated by the Board of Trustees of the Galveston Wharves. Admit that in that capacity he also is required by the Board of Trustees of the Galveston Wharves to currently serve as President of GPFC.

41. Mr. Mark Murchison is the director of finance for The Port of Galveston. (Depo M. Murchison Depo at 5:14-22, 8:14-19 (ALJ App. 414)).

Response: Respondents admit that Mark Murchison is the current Director of the Galveston Wharves, which is also known as the Port of Galveston.

42. In that position, Mr. Murchison is responsible for general ledger reporting, budgeting, financial reporting, accounts payable, accounts receivable, and payroll for The Port of Galveston. *Id.*

Response: Respondents admit that the duties listed above are some of Mr. Murchison's duties as Director of Finance of the Wharves.

43. The Wharves Board's 2014 budget provided operating expenses for the Cruise Terminal of \$7.2 million, and cruise passenger revenue for same of \$5.7 million. (Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 12:5-12 (ALJ App. 418)).

Response: Respondents object to this proposed finding because Complainants rely upon statements made by an unidentified individual during discussion at the May 12, 2014, Special Finance Committee Meeting regarding the calculation of a proposed access fee increase. Respondents further object because the audio transcript is not the best source for this information. The evidenced proffered to support this proposed finding of fact is not the Wharves' Board 2014 budget as adopted by the Board. Rather the proffered source is an alleged audio transcription of a Wharves Finance Committee meeting which does not represent the actual budget. Further, the speaker in the transcript is identified solely as "Unidentified Speaker" and the description regarding the numbers stated in Proposed Finding of Fact No. 43 are not described as being "budgeted" by the Board of Trustees. As such the use of a transcript which does not even identify sources of information is not only hearsay but cannot give rise to any hearsay exception because it fails to identify whether the person speaking has any relationship to the Wharves or had the authority to bind the Wharves to any statements made by this unidentified person.

Further, this alleged finding is irrelevant as it, as cited, relates to an analysis and study performed in May of 2014 for consideration of the \$28.88 per space access fee which was rescinded. The proposed finding is not relevant to any claim in this proceeding. Respondents admit that the Wharves' 2014 Budget provided for, amongst other things, operating expenses for the Port in the amount of \$26,725,597.00 and cruise passenger

revenue in the amount of \$5,193,240.00. (Wharves 2014 Budget, Resp. App. Tab. No. 17 at p. 001403).

44. Respondents claim that the revenues of GPFC do not cover the expenses of Respondents' Cruise Terminal. *Id.*; Port of Galveston Analysis of Access Fees (ALJ App. 436); Depo. M. Mierzwa at 73:8-14 (ALJ App. 293)).

Response: Respondents object because the analysis of Access Fees and deposition testimony of Mr. Mierzwa are not the best sources for this information. Subject thereto, Respondents admit that revenues generated by GPFC from operations of the Cruise Terminal do not cover the expenses GPFC incurs for the Cruise Terminal. (Galveston Wharves Comprehensive Annual Financial Reports for 2006-2014 (Resp. App. Tab. Nos. 9-16 p. 794-1402; Affidavit of Mark Murchison ¶29, Resp. App. Tab. No. 77 at p. 002087).

45. The Wharves Board charges "Access Fees" to fund the stated difference between GPFC's revenues and expenses. (Depo. M. Mierzwa at 68:11-19, 80:25 – 87:12, and 91:8-24 (ALJ App. 293)).

Response: Respondents object to this proposed finding as it is a mischaracterization of the testimony cited. A reading of the testimony makes clear that Mr. Mierzwa was discussing a proposal by the study group in May of 2014 and how that group determined to recommend raising the \$8 per space per month fee charged to the Complainants based on information available "at that time." Depo. Of M. Mierzwa at 67:1-25 through 69:1-18 (Resp. App. Tab. No. 78 at p 002202-002204). Subject to and without waiving these objections, Respondents admit that the Wharves Board charges access fees to recoup some of the deficit between Cruise Terminal operations revenues and expenses. Affidavit of Mark Murchison ¶13 (Resp. App. Tab. No. 77 at p. 002084).

46. The Cruise Terminal is not operating at a loss. (Port of Galveston Analysis of Access Fees (ALJ App. 436)).

Response: Denied. The citation referenced to support this proposed finding of fact does not contain the information set forth in the finding. The page cited is a pie chart entitled "Port of Galveston Analysis of Access Fees" and provides no financial data. (Comp. 436). This proposed finding is patently false and the document proffered as proof of this proposition does not support this claim. The documents specifically note a projected operating loss of \$1,486,925.00. (Comp. App. 439). Further this document is not relevant. The time period referenced in the document relates to an analysis and study performed in May of 2014 for consideration of the \$28.88 per space access fee which was rescinded retroactively. No tariff has been enforced which relied upon or forms the basis of this study. Therefore, the proposed finding is not relevant to any claim in this proceeding. (Galveston Wharves Comprehensive Annual Financial Reports for 2006-2014 (Resp. App. Tab. Nos. 9-16; Affidavit of Mark Murchison ¶29, Resp. App. Tab. No. 77 at p. 002087).

47. In presenting their analysis during their May 12, 2014 meeting showing a loss of approximately \$1,486,925, the Special Finance Committee did not include the Cruise Terminal's budgeted revenue from parking lots "A" and "B" in the amount of \$4,153,650. *Id.*

Response: Respondents object to this proposed finding because Complainants rely upon a PowerPoint presentation used at the May 12, 2014, Special Finance Committee Meeting for demonstrative purposes only. Affidavit of Mark Murchison ¶11 (Resp. App. Tab. No. 77 at p. 002083). Additionally, Respondents object because the page referenced does not contain the information mentioned in Complainants' proposed finding. The page cited is a pie chart entitled "Port of Galveston Analysis of Access Fees" and provides no financial data. (Comp. App. 436). Respondents further object because this power point presentation is not the best source for this information. The time period referenced in the document relates to an analysis and study performed in May of 2014 for consideration of the \$28.88 per space access fee which was rescinded retroactively. No tariff has been implemented and enforced which relied upon or forms the basis of this study. The proposed finding is not relevant to any claim in this proceeding. Subject to these objections, Respondents admit that the staff participating in the study determined that the projected revenues from the operation of the Cruise Terminal exceeded the expenses for the same, and that the Wharves' lots was not used in the calculation of projected revenue. Additionally, the Wharves was presumed to pay access fees equal to private lots for the percentage of cruise passenger parking spaces which it owned and operated. *Id.* Counting revenue from the Wharves' parking lots would result in an overcharge to the Wharves. *Id.* Moreover, any net revenues generated by the Wharves Parking operation was already budgeted to be used for other expenses associated with running the Port of Galveston.

48. The Cruise Terminal collects approximately \$9,894,883 in total annual revenues, and bears approximately \$7,228,158 in total annual expenses. *Id.*

Response: Respondents object to this proposed finding because the citation referenced to support this proposed finding of fact does not contain the information set forth in the finding. The page cited is a pie chart entitled "Port of Galveston Analysis of Access Fees" and provides no financial data. (Comp. App. 436). Further this document is not relevant. The time period referenced in the document relates to an analysis and study performed in May of 2014 for consideration of the \$28.88 per space access fee which was never put into effect. No tariff has been implemented and enforced which relied upon or forms the basis of this study. The proposed finding is not relevant to any claim in this proceeding. Further, this report dealt with financial data at a specific time period, May of 2014. The proposed finding implies that the revenue and expense amounts listed were applicable to all times relevant to this lawsuit. There is no evidence or citation proffered by Complainants to allow for such an assumption. Respondents admit that the Wharves Board's 2014 Budget provided for, amongst other things, operating expenses for the Cruise Terminal in the amount of \$7,228,158.00 and cruise passenger revenue in the amount of \$5,741,233.00 for a net loss of \$1,486,925.00. Wharves 2014 Budget, BOT_017915 (Resp. App. Tab. No. 17 at p. 001403). To the extent the revenues set out in the finding of fact include parking revenues, Respondents' Objections and answer to Finding No. 47 above are incorporated by

reference. Additionally, this Finding includes only revenues for the Wharves' parking lots and not expenses.

49. The between 2006 and 2014, the Wharves Board determined the Access Fees to charge by considering the recorded number of accesses to the Cruise Terminal by all vehicles subject to Access Fees under the Tariff, with the exception of "Off-Port Parking Users." (Depo. M. Mierzwa at 68:21 – 69:18, 143:25 – 145:5 (ALJ App. 293).

Response: Respondents object to this proposed finding because, as originally written, it was uncited. Respondents also object to this proposed finding as it is a mischaracterization of the testimony cited. The discussion with Mr. Mierzwa makes clear that he was discussing a proposal by the study group in May of 2014 and how that group determined to recommend raising the \$8 per space per month fee charged to the Complainants and the per trip access fees charged to other users based on information available "at that time." Depo. M. Mierzwa at 67:1-25 through 69:1-18, 143:25 – 145:5 (Comp. App. 293). In May of 2014, a study group of Port Staff recommended that the Port use a similar formula to assess the proposed and later rescinded \$28.88 fee to Complainants. The time period referenced in the study group documents relates to an analysis and study performed the above referenced analysis every year from in May of 2014 for consideration of the \$28.88 per space access fee which was never put into effect. No tariff has been implemented and enforced which relied upon or forms the basis of this study. Complainants then are asking the Judge to retroactively apply this rejected formula to 2006 through 2014 in order to bolster their alleged reparations claims. Subject to and without waiving these objections, Respondents deny conducting the above referenced analysis at any time from 2006 until 2013, but admit to conducting this analysis in 2014. Affidavit of Mark Murchison ¶17 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Peter Simons ¶3 (Resp. App. Tab. No. 76 at p. 002078).

50. From that data, the Wharves Board determines the anticipated revenue generated by the Tariff by those users. *Id.*

Response: Respondents object to this proposed finding because, as originally written, it was uncited. Respondents also object to this proposed finding as it is a mischaracterization of the testimony cited. The discussion with Mr. Mierzwa makes clear that he was discussing a proposal by the study group in May of 2014 and how that group determined to recommend raising the \$8 per space per month fee charged to the Complainants and the per trip access fees charged to others users based on information available "at that time." Depo. M. Mierzwa at 67:1-25 through 69:1-18, 143:25 – 145:5 (Comp. App. 293). In May of 2014, a study group of Port Staff recommended that the Port use a similar formula to assess the proposed and later rescinded \$28.88 fee to Complainants. The time period referenced in the study group documents relates to an analysis and study performed the above referenced analysis every year from in May of 2014 for consideration of the \$28.88 per space access fee which was never put into effect. No tariff has been implemented and enforced which relied upon or forms the basis of this study. Complainants then are asking the Judge to retroactively apply this rejected formula to 2006 through 2014 in order to

bolster their alleged reparations claims. Subject to and without waiving these objections, Respondents deny conducting the above referenced analysis at any time from 2006 until 2013, but admit to conducting this analysis in 2014. Affidavit of Mark Murchison ¶17 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Peter Simons ¶3 (Resp. App. Tab. No. 76 at p. 002078).

51. That number was then subtracted from the deficit represented by the difference between GPFC's revenues and the expenses of the Cruise Terminal. *Id.*

Response: Respondents object to this proposed finding because, as originally written, it was uncited. Respondents also object to this proposed finding as it is a mischaracterization of the testimony cited. The discussion with Mr. Mierzwa makes clear that he was discussing a proposal by the study group in May of 2014 and how that group determined to recommend raising the \$8 per space per month fee charged to the Complainants and per trip access fees charged to other users based on information available "at that time." Depo. M. Mierzwa at 67:1-25 through 69:1-18, (Resp. App. Tab. No. 78 at p. 002202-002204); 143:25 – 145:5 (Comp. App. 16 at p.00311). In May of 2014, a study group of Port Staff recommended that the Port use a similar formula to assess the proposed and later rescinded \$28.88 fee to Complainants. The time period referenced in the study group documents relates to an analysis and study performed the above referenced analysis every year from in May of 2014 for consideration of the \$28.88 per space access fee which was never put into effect. No tariff has been implemented and enforced which relied upon or forms the basis of this study. Complainants then are asking the Judge to retroactively apply this rejected formula to 2006 through 2014 in order to bolster their alleged reparations claims. Subject to and without waiving these objections, Respondents deny conducting the above referenced analysis at any time from 2006 until 2013, but admit to conducting this analysis in 2014. Affidavit of Peter Simons ¶3 (Resp. App. Tab. No. 76 at p. 002078); Affidavit of Mark Murchison ¶17 (Resp. App. Tab. No. 77 at p. 002085).

52. The Wharves Board then divided the remaining portion of the deficit by the total number of parking spaces operated by the Wharves Board and certain "Off-Port Parking Users," including Complainants. *Id.*

Response: Respondents object to this proposed finding because, as originally written, it was uncited. Respondents also object to this proposed finding as it is a mischaracterization of the testimony cited. The discussion with Mr. Mierzwa makes clear that he was discussing a proposal by the study group in May of 2014 and how that group determined to recommend raising the \$8 per space per month fee charged to the Complainants and per trip access fees charged to other users based on information available "at that time." Depo. M. Mierzwa at 67:1-25 through 69:1-18, (Resp. App. Tab. No. 78 at p. 002202-002204); 143:25 – 145:5 (Comp. App. 16 at p.00311)). In May of 2014, a study group of Port Staff recommended that the Port use a similar formula to assess the proposed and later rescinded \$28.88 fee to Complainants. The time period referenced in the study group documents relates to an analysis and study performed the above referenced analysis every year from in May of 2014 for consideration of the \$28.88 per space access fee which was

never put into effect. No tariff has been implemented and enforced which relied upon or forms the basis of this study. Complainants then are asking the Judge to retroactively apply this rejected formula to 2006 through 2014 in order to bolster their alleged reparations claims. Subject to and without waiving these objections, Respondents deny conducting the above referenced analysis at any time from 2006 until 2013, but admit to conducting this analysis in 2014. Affidavit of Mark Murchison ¶17 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Peter Simons ¶3 (Resp. App. Tab. No. 76 at p. 002078).

53. The resulting number was the per-space, per-month Access Fee charged to Complainants. *Id.*

Response: Respondents object to this proposed finding because, as originally written, it was uncited. Respondents also object to this proposed finding as it is a mischaracterization of the testimony cited. The discussion with Mr. Mierzwa makes clear that he was discussing a proposal by the study group in May of 2014 and how that group determined to recommend raising the \$8 per space per month fee charged to the Complainants and per trip access fees charged to other users based on information available “at that time.” Depo. M. Mierzwa at 67:1-25 through 69:1-18, (Resp. App. Tab. No. 78 at p. 002202-002204); 143:25 – 145:5 (Comp. App. 16 at p.00311)). In May of 2014, a study group of Port Staff recommended that the Port use a similar formula to assess the proposed and later rescinded \$28.88 fee to Complainants. The time period referenced in the study group documents relates to an analysis and study performed the above referenced analysis every year from in May of 2014 for consideration of the \$28.88 per space access fee which was never put into effect. No tariff has been implemented and enforced which relied upon or forms the basis of this study. Complainants then are asking the Judge to retroactively apply this rejected formula to 2006 through 2014 in order to bolster their alleged reparations claims. Subject to and without waiving these objections, Respondents deny conducting the above referenced analysis at any time from 2006 until 2013, but admit to conducting this analysis in 2014. Affidavit of Mark Murchison ¶17 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Peter Simons ¶3 (Resp. App. Tab. No. 76 at p. 002078).

54. In December 2007, the Wharves Board promulgated Tariff Circular No. 6, which sets forth fees the Wharves Board charges for vehicular access to the Cruise Terminal. (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111 and 3-G) (ALJ App. 444)).

Response: Respondents admit that the Wharves Board promulgated an amendment to Tariff Circular No. 6 in December of 2007. Respondents additionally assert that Tariff Circular No. 6, Item 111 was initially promulgated in 2003. (Wharves–Tariff Circular No. 6, (Item 111) approved November 14, 2003, BOT_017471-017543 (Resp. App. Tab. No. 1, pgs. 1-73). The tariff revision which first set out the per space access fee methodology requested by Complainants was approved on August 28, 2006. (Wharves–Tariff Circular No. 6, (Item 111) approved August 28, 2006, BOT_017544-017618 (Resp. App. Tab. No. 2, pgs. 74-148). Otherwise, denied.

55. Those fees include—but are not limited to—Decal Fees and Access Fees. *Id.*

Response: Respondents admit that the Wharves Board promulgated an amendment to Tariff Circular No. 6 in December of 2007, which allowed for Decal and Access Fees. Respondents additionally assert that Tariff Circular No. 6, Item 111, providing for various decal and access fees, was initially promulgated in 2003. (Wharves–Tariff Circular No. 6, (Item 111) approved November 14, 2003, BOT_017471-017543 (Resp. App. Tab. No. 1, pgs. 1-73). The tariff revision which first set out the per space access fee methodology requested by Complainants was approved on August 28, 2006. (Wharves–Tariff Circular No. 6, (Item 111) approved August 28, 2006, BOT_017544-017618 (Resp. App. Tab. No. 2, pgs. 74-148). Otherwise, denied.

56. The Wharves Board charges Cruise Terminal users Access Fees for bringing their vehicles onto the Port’s property. (Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014, at 8:18-19 (ALJ App. 534)).

Response: Respondents object to this proposed finding because it mischaracterizes the tariff. Respondents further object to this proposed finding because the document cited is not admissible and has not been authenticated. This alleged “official” transcription of the September 22, 2014, Special Finance Committee Meeting was prepared by Complainants’ counsel’s legal assistant. (Comp. App. 535). This transcription has never been authenticated as an accurate transcription of the events represented per Fed. R. Evid. 502. No evidence has been offered to demonstrate that Ms. Fine, the legal assistant, is a certified court reporter or otherwise legally qualified to make the transcription. Additionally, the transcription contains a number of inaccuracies, including but not limited to, the designation of W. Hulse Wagner (Wharves legal counsel) and Michael Mierzwa (Port Director) as Trustees. Furthermore, Respondents object to this proposed finding because it is ambiguous as written and implies that the Wharves charges all individuals that access the Cruise Terminal. To the contrary, the Wharves only assesses fees into persons that meet the Tariff’s definition of “ground transportation company.” (Wharves–Tariff Circular No. 6, (Item 111) approved August 28, 2006, BOT_017544-017618 (Resp. App. Tab. No. 2, pgs. 74-148). Under the Tariff, a “ground transportation company” means any person (other than the Galveston Wharves or any person or entity under contract to provide transportation services for the Galveston Wharves) owning or operating the following types of vehicles as defined in this section: commercial passenger vehicle, bus, bus service, charter bus, courtesy vehicle, shuttle, limousine, taxi or taxicab service. *Id.*

57. Tariff Circ. No. 6 defined an “Off-Port Parking User” as “a commercial business entity which provides or arranges for one or more commercial passenger vehicles, courtesy vehicles, buses or shuttles, however owned or operated, to pick up or drop off passengers within a terminal complex of the Galveston Wharves in connection with the operations of a business of the user involving the parking of motor vehicles of any type at a facility located outside of the boundaries of property owned, operated or controlled by the Galveston Wharves.” (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111) (5th Revised Page 3-F) at 3-I (ALJ App. 444)).

Response: Respondents admit that this is the definition of “Off-Port Parking User” provided by the Tariff at Complainants’ request. (Affidavit of Michael Mierzwa ¶¶19, 20 (Resp. App. Tab. No. 75 at p. 002072)).

58. A hotel that parks cruise passengers’ vehicles for a fee and arranges for transportation to drop off and pick up those passengers at the Cruise Terminal without paying Access/Trip fees, meets the definition of an “Off-Port Parking User.” (Depo. M. Mierzwa at 173:3-12 (ALJ App. 293); *see also* Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F) at 3-I (ALJ App. 444)).

Response: Respondents object to this proposed finding because the citation offered for the proof of this finding, Depo. M. Mierzwa at 173:3-12 (ALJ App. 293 does not support this assertion. First, page 293 of Complainants’ Appendix is not testimony but the cover page of Mr. Mierzwa’s deposition. Second, the page cited from that deposition, Page 173: 3-12 is not included anywhere in Complainants’ Appendix. The reference at Page 173 of Mr. Mierzwa’s deposition was an attempt by Complainants’ counsel to have Mr. Mierzwa try to agree that hotels fall into the same user category in the Tariff as the Complainants. Mierzwa disagreed. Depo of Michael Mierzwa 173:18-20 (Resp. App. Tab. No. 78 at p. 002238). Respondents deny this proposed finding because it mischaracterizes the language of the tariff. Furthermore, Hotels do not meet the definition of “Off-Port Parking user because they are not primarily engaged in the business of parking for the cruise terminal. Hotels are in the business of lodging, and parking offered is merely incidental to their lodging purpose. Hilton Galveston Island Cruise Ship Numbers April 2013- March 2014; BOT_012979 (Resp. App. Tab. No. 49 at p. 001757); Affidavit of Steve Cunningham at ¶6 (Resp. App. Tab. No. 88 at p. 002626); Mierzwa Deposition at 173:18-20 (Resp. App. Tab No. 78 at p. 002238). There is no evidence of any hotels that charge a fee to park cruise passengers’ vehicles. The minutes of the August 2006 meeting of the Board of Trustees discussing approving the \$8 flat fee and its applicability made it clear that 1) it only applied to Complainants, and 2) it was the result of a request from and negotiations with the Complainants to reach an agreement on a flat fee. Shortly after the enactment of the tariff, the Port sent a notice of the new tariff to all ground transportation companies. Notice to Commercial Vehicle Services Port Users, BOT_011051 (Resp. App. Tab. No. 69 at p. 001946).

59. When local hotels/motels engage in parking cruise passengers’ vehicles, they are “no different than a parking lot.” (Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014 at 19:18-20 (ALJ App. 534)).

Response: Respondents object to this proposed finding because Complainants rely upon statements made by an unidentified individual during discussion at the September 22, 2014, Special Finance Committee Meeting. The statements voiced are merely the opinions of a single individual and does not reflect any opinion or decision of the Board of Trustees. Respondents further object to this proposed finding because the document cited is not admissible and has not been authenticated. This alleged “official” transcription of the September 22, 2014, Special Finance Committee Meeting was prepared by Complainants’

counsel's legal assistant. (Comp. App. 535). This transcription has never been authenticated as an accurate transcription of the events represented per Fed. R. Evid. 502. No evidence has been offered to demonstrate that Ms. Fine, the legal assistant, is a certified court reporter or otherwise legally qualified to make the transcription. Additionally, the transcription contains a number of inaccuracies, including but not limited to, the designation of W. Hulse Wagner (Wharves legal counsel) and Michael Mierzwa as Trustees. Complainants' alleged transcript begins at ALJ 534 and ends at ALJ 547, thirteen pages in total. There is no page 19:18-20 in the document. Further, the alleged discussion in this transcript relates to a decision in September of 2014 to change the flat fee rate charged Complainants to the same rate as charged hotel shuttles because they complained they were not being treated the same. Furthermore, the Special Finance Committee is not the Board of Trustees and does not have any statutory decision making power. Respondents deny this proposed finding because it mischaracterizes the language of the tariff. There is no evidence that any hotels charge cruise passengers for cruise parking. Furthermore, Hotels do not meet the definition of "Off-Port Parking user because they are not primarily engaged in the business of parking for the cruise terminal. Hotels are in the business of lodging, and parking offered is merely incidental to their lodging purpose. Hilton Galveston Island Cruise Ship Numbers April 2013- March 2014; BOT_012979 (Resp. App. Tab. No. 49 at p. 001757). (Affidavit of Steve Cunningham (Resp. App. Tab. No. 88 at p. 002625 002626).

60. Local hotels/motels provide parking for cruise passengers vehicles and transportation to and from the Cruise Terminal for cruise passengers. (Galveston.com – Hotel Advertisements for Cruise Parking (ALJ App. 510); Hotelnparking.com – Roadway Inn Galveston Cruiseport, TX Advertisement (ALJ App. 514); Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 20:5-7, 21:6-9, 24:12-14, and 27:12-20 (ALJ App. 418); Depo. M. Mierzwa at 165:6 - 168:20 (ALJ App. 293); Letter from Candlewood to Mierzwa, 9/7/12 (ALJ App. 767)).

Response: Respondents object to this proposed finding as it incorrectly implies that all local hotels and motels provide parking and transportation to cruise ship passengers. Respondent restates their objections to the alleged transcription from the May 12, 2014 meeting wherein all persons in the meeting are described as "Unidentified" so it cannot be determined the identity of the speaker, the qualifications of the speaker or whether the speaker had authority to speak for and bind the Board of Trustees in order to overcome exclusion on the basis of hearsay. The transcript references to Mr. Mierzwa do not support the allegation and the referenced Candlewood letter is hearsay which Mr. Mierzwa himself testified that he had no ability to verify any of the statements made in the letter by its author. The Hotel Advertisements are also hearsay and should be excluded.

61. The number of parking spaces being utilized for cruise passenger vehicles in local hotel/motel parking lots was not considered in determining access fees. (Depo. M. Mierzwa at 151:23 – 152:2 (ALJ App. 293)).

Response: Respondents admit that hotels are charged per access to the Cruise Terminal as provided for in the Tariff. Affidavit of Steve Cunningham (Resp. App. Tab. No. 88 at p. 002625-002626). Respondents further note that it would be difficult, if not impossible to predict the amount of spaces in a Hotel's parking lot are used by cruise ship passengers at any given time. Depo of George Templeton, pages 42-43 (Resp. App. Tab. No. 83 at p. 002533-002534); Affidavit of Steve Cunningham (Resp. App. Tab. No. 88 at p. 002625 002626).

62. The Wharves Board does not want to charge local hotels/motels in the same manner as they charge Complainants. (Board of Trustees of the Galveston Wharves – Special Finance Committee Meeting Notes, dated, Monday, May 12, 2014, at p. 4 (ALJ App. 515)).

Response: Respondents object to this proposed finding because the “Meeting Notes” are summary notes, by an unidentified author, of a discussion between various members of the Finance Committee. The notes do not reflect a vote or concurrence of that Committee much less the Board of Trustees of the Galveston Wharves. The notes actually make clear that no decision was made indicating that the discussion was not indicative of the policies of the entire board. Whatever the decision of the Board is, we need to look at this every 6 months because it is a large source of revenue (GS)P. 4, (Comp. App. 515). Respondents deny this proposed finding because they did treat Complainants in the same manner as hotels until Complainants requested different treatment in 2006. (Cindy Hayes letter dated June, 14, 2005, BOT_010819 (Resp. App. Tab. No. 51 at p. 001765); Cindy Hayes letter dated October 15, 2005, BOT_010815 (Resp. App. Tab. No. 53 at p. 001773); Michael Mierzwa letter dated July 20, 2006, BOT_010816-010818 (Resp. App. Tab. No. 54 at p. 001774-001776); Depo. of George Templeton at 40:12-40:25 (Resp. App. Tab. No. 83 at p. 002531); “Shuttle Diplomacy” Article in July 31, 2006, edition of The Daily News, EZC_A_001811-001813 (Resp. App. 47 at p. 001751-001753); Depo. Of Sylvia Robledo at 63:2-63:4 (Resp. App. Tab. No. 80 at p. 002321). Moreover, the current Tariff provisions expressly charge everyone, including hotels/motels and complainants, on the same per-trip basis. Tariff dated September 22, 2014 (Resp. App. Tab No. 6 at p. 000387-000400).

63. Despite local hotels/motels meeting the Tariff’s definition of “Off-Port Parking Users,” and the express applicability of the 2006 and 2014 Tariff to local hotels/motels, local hotels/motels have not been charged Access Fees as required of “Off-Port Parking Users.” (Depo. M. Mierzwa at 173:3 – 174:7 (ALJ App. 293)).

Response: Respondents deny that local hotels and motels meet the Tariff’s definition of “Off-Port Parking Users” because they are not primarily engaged in the business of parking for the cruise terminal. Hotels are in the business of lodging, and parking offered is merely incidental to their lodging purpose. (Hilton Galveston Island Cruise Ship Numbers April 2013- March 2014; BOT_012979 (Resp. App. Tab. No. 49 at p. 001757). (Affidavit of Steve Cunningham (Resp. App. Tab. No. 88 at p.002625-002626). As such, hotels and motels that access the Cruise Terminal have been charged access fees through the Tariff on a per-trip basis as is proper. (Commodore Access Fees (BOT 015921 – BOT 15950) (Comp. App. 771), County Inn Access Fees (BOT 015951 – BOT 15982) (Comp. App. 801), Marriott Access Fees (BOT 015983 – BOT 16004) (Comp. App. 833),

Fertitta Access Fees (BOT 016196 – BOT 16262) (Comp. App. 855), Galveston Beach Hotel Access Fees (BOT 016263 – BOT 16273) (Comp. App. 922), Hampton Inn Access Fees (BOT 016274 – BOT 16321) (Comp. App. 933), Holiday Inn Access Fees (BOT 016322 – BOT 16379) (Comp. App. 982), Holiday Inn (Sunspreet Resort) Access Fees (BOT 016380 – BOT 16441) (Comp. App. 1039), Galvez Hotel Access Fees (BOT 016442 – BOT 16557) (Comp. App. 1101), Inn at the Waterpark Access Fees (BOT 016558 – BOT 16568) (Comp. App. 1217), Island Breeze Shuttle Access Fees (BOT 016569 – BOT 16579) (Comp. App. 1228), LaQuinta Hotel Access Fees (BOT 016580 – BOT 16686) (Comp. App. 1239), Moody Gardens Access Fees (BOT 016798 – BOT 16916) (Comp. App. 1346), San Luis Hotel Access Fees (BOT 016922 – BOT 17038) (Comp. App. 1465), Tremont Hotel Access Fees (BOT 017039 – BOT 17144) (Comp. App. 1582). As noted above the tariff in force from August of 2006 to October of 2014 used a flat fee rate for Complainants at their request. Further, as noted above this flat fee rate only applied to Complainants and not these hotels. Further, not all local hotels/motels can be presumed to access the cruise terminal. Only those who accessed it to unload and load cruise passengers were obligated to pay an access fee.

64. The access fees imposed by the Wharves Board from December 17, 2007 through July 1, 2014 were as follows: (1) Bus, commercial passenger vehicle, or courtesy vehicle with seating capacity of greater than fifteen persons: \$50.00 per Access/Trip; (2) Commercial passenger vehicle, courtesy vehicle, shuttle or limousine with seating capacity of fifteen persons or more: \$20.00 per Access/Trip; (3) Commercial passenger vehicle, courtesy vehicle, or shuttle with seating capacity of up to fourteen persons: \$10.00 per Access/Trip; (4) Limousine or taxi and taxicabs with seating capacity of nine to fourteen persons: \$10.00 per Access/Trip; (5) Limousines with seating capacity of not more than eight persons: \$10.00 per Access/Trip; and (6) Taxi and taxicabs with seating capacity of not more than eight persons: \$0.00 per Access/Trip. (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F) at 3-F (ALJ App. 444); Depo. M. Mierzwa at 159:9 – 160:23, 161:18 – 163:2 (ALJ App. 293)).

Response: Denied in part and admitted in part. Respondents object to this proposed finding of fact because it misrepresents the tariff language and is an incomplete statement as to the fees assessed under the December 2007 tariff. No. (2) above should state for a seating capacity of fifteen people (not or more). No. (5) above included decal fees only from December 2007 through May 19, 2014. As of May 2014, the tariff changed to reflect an access fee of \$20.00 for limousines with a seating capacity of less than 15 people. Respondents also fail to mention the tariff also reflected access fees charged to Off-Port parking users. Otherwise, admitted as to the December 17, 2007 tariff. December 17, 2007 Tariff, BOT_17637, (Resp. App. Tab. No. 3, p. 167).

65. Between January 1, 2008 and December 31, 2013, no vehicle subject to the Tariff was charged an Access Fee greater than \$10.00. (Certificate of Summary (ALJ App. 768); Summary – Cruise Terminal Users Invoiced for Access Fees (ALJ App. 769) [the preceding summary is based on the following documents: (Commodore Access Fees (BOT 015921 – BOT 15950) (ALJ App. 771), County Inn Access Fees (BOT 015951 – BOT

15982) (ALJ App. 801), Marriott Access Fees (BOT 015983 – BOT 16004) (ALJ App. 833), Fertitta Access Fees (BOT 016196 – BOT 16262) (ALJ App. 855), Galveston Beach Hotel Access Fees (BOT 016263 – BOT 16273) (ALJ App. 922), Hampton Inn Access Fees (BOT 016274 – BOT 16321) (ALJ App. 933), Holiday Inn Access Fees (BOT 016322 – BOT 16379) (ALJ App. 982), Holiday Inn (Sunspreet Resort) Access Fees (BOT 016380 – BOT 16441) (ALJ App. 1039), Galvez Hotel Access Fees (BOT 016442 – BOT 16557) (ALJ App. 1101), Inn at the Waterpark Access Fees (BOT 016558 – BOT 16568) (ALJ App. 1217), Island Breeze Shuttle Access Fees (BOT 016569 – BOT 16579) (ALJ App. 1228), LaQuinta Hotel Access Fees (BOT 016580 – BOT 16686) (ALJ App. 1239), Moody Gardens Access Fees (BOT 016798 – BOT 16916) (ALJ App. 1346), San Luis Hotel Access Fees (BOT 016922 – BOT 17038) (ALJ App. 1465), Tremont Hotel Access Fees (BOT 017039 – BOT 17144) (ALJ App. 1582), The Woodlands Access Fees (BOT 017180 – BOT 17185) (ALJ App. 1688), AAA Corporation Access Fees (BOT 017186 – BOT 17190) (ALJ App. 1694), Abiding Limo Access Fees (BOT 017191 – BOT 17193) (ALJ App. 1699), Action Limo Access Fees (BOT 017194 – BOT 17201) (ALJ App. 1702), AFC Corporate Transportation Access Fees (BOT 017202 – BOT 17205) (ALJ App. 1710), AIM Limo Access Fees (BOT 017206 – BOT 17210) (ALJ App. 1714), Airport Transportation Access Fees (BOT 017211 – BOT 17212) (ALJ App. 1719), American Standard Limo Access Fees (BOT 017213 – BOT 17214) (ALJ App. 1721), American Transport Access Fees (BOT 017215 – BOT 17222) (ALJ App. 1723), Avanti Transport Access Fees (BOT 017223 – BOT 17227) (ALJ App. 1731), Best Limo Access Fees (BOT 017228 – BOT 17230) (ALJ App. 1736), Big Star Custom Coach Access Fees (BOT 017233 – BOT 172236) (ALJ App. 1739), Blackhorse Limo Access Fees (BOT 017233 – BOT 17236) (ALJ App. 1741), Black Tie Limo Access Fees (BOT 017237 – BOT 17239) (ALJ App. 1745), C&S Executive Transport Access Fees (BOT 017240 – BOT 17243) (ALJ App. 1748), Carey Worldwide Services, Inc. Access Fees (BOT 017244 – BOT 17247) (ALJ App. 1752), Cheap Town Car Limo Access Fees (BOT 017248 – BOT 17251) (ALJ App. 1756), Cherry Limo Transportation Access Fees (BOT 017252 – BOT 17254) (ALJ App. 1760), Clark's Travel Access Fees (BOT 017255 – BOT 17257) (ALJ App. 1763), Clear Lake Shuttle Bus Access Fees (BOT 017258 – BOT 17277) (ALJ App. 1766), Colony Limo Access Fees (BOT 017278 – BOT 17279) (ALJ App. 1786), Corporate Limo Access Fees (BOT 017280 – BOT 172281) (ALJ App. 1788), Cowtown Charters Access Fees (BOT 017282 – BOT 17292) (ALJ App. 1790), Daisy Tours & Conventions Access Fees (BOT 017293 – BOT 17296) (ALJ App. 1801), Devine Towncar & Limo Access Fees (BOT 017297 – BOT 17298) (ALJ App. 1805), Distinct Class Limo Access Fees (BOT 017299 – BOT 17303) (ALJ App. 1807), Enterprise Rent-A-Car Access Fees (BOT 017304 – BOT 17307) (ALJ App. 1812), Envoy Executive Limo Access Fees (BOT 017308 – BOT 17310) (ALJ App. 1816), Executive Transportation Access Fees (BOT 017311 – BOT 17313) (ALJ App. 1819), Extreme Elegance Access Fees (BOT 017314 – BOT 17316) (ALJ App. 1822), Finesse Transportation Access Fees (BOT 017317 – BOT 17318) (ALJ App. 1825), First Class Access Fees (BOT 017319 – BOT 17322) (ALJ App. 1827), Galveston Limo Access Fees (BOT 017323 – BOT 17336) (ALJ App. 1831), Garcia Garcia Access Fees (BOT 017337 – BOT 17338) (ALJ App. 1845), Gatlen Adventures Access Fees (BOT 017339 – BOT 17340) (ALJ App. 1847), Gemini Limo Access Fees (BOT 017341 – BOT 17343) (ALJ App. 1849), Gotta Go Trailways Access Fees (BOT 017344 – BOT 17346) (ALJ App. 1852), Gulf Coast Limo Services Access Fees (BOT 017347 – BOT 17348) (ALJ App. 1855), Houston Executive Limo Access Fees (BOT 017349 – BOT 17350) (ALJ App.

1857), Houston Express Limo Access Fees (BOT 017351 – BOT 17354) (ALJ App. 1859), J&J Tours Access Fees (BOT 017355 – BOT 17358) (ALJ App. 1863), Lonestar Executive Limo Access Fees (BOT 017359 – BOT 17362) (ALJ App. 1867), Lone Star Access Fees (BOT 017363 – BOT 17369) (ALJ App. 1871), Merlo's Limo's Access Fees (BOT 017370 – BOT 17377) (ALJ App. 1878), Onyx Limo Service Access Fees (BOT 017378 – BOT 17384) (ALJ App. 1886), Pride Limo Service Access Fees (BOT 017385 – BOT 17387) (ALJ App. 1893), Primavera Access Fees (BOT 017388 – BOT 17391) (ALJ App. 1896), R&R Partnership Access Fees (BOT 017392 – BOT 17396) (ALJ App. 1900), Reliance Limo & Town Car Access Fees (BOT 017397 – BOT 17399) (ALJ App. 1905), Royal Carriages Access Fees (BOT 017400 – BOT 17413) (ALJ App. 1908), South Houston Limo Access Fees (BOT 017414 – BOT 17419) (ALJ App. 1922), Select Corporate Access Fees (BOT 017420 – BOT 17422) (ALJ App. 1928), Shif Limo Access Fees (BOT 017423 – BOT 17424) (ALJ App. 1931), Sierra Trailways Access Fees (BOT 017425 – BOT 17428) (ALJ App. 1933), SMZ Transportation Access Fees (BOT 017429 – BOT 17433) (ALJ App. 1937), Space Town Transportation Access Fees (BOT 017434 – BOT 17437) (ALJ App. 1942), Superior Limo Access Fees (BOT 017438 – BOT 17439) (ALJ App. 1946), Totally Texas Limo Access Fees (BOT 017440 – BOT 17445) (ALJ App. 1948), Town Car Limo Access Fees (BOT 017446 – BOT 17447) (ALJ App. 1954), Transgate Limo Access Fees (BOT 017448 – BOT 17452) (ALJ App. 1956), Transportation Unlimited Access Fees (BOT 017453 – BOT 17455) (ALJ App. 1961), Western Motorcoach, Inc. Access Fees (BOT 017456 – BOT 17457) (ALJ App. 1964), Wynn Coaches Access Fees (BOT 017458 – BOT 17461) (ALJ App. 1966), Z Limo Services Access Fees (BOT 017462 – BOT 17470) (ALJ App. 1970)]].

Response: Denied. By Complainants' own argument, buses were charged \$50.00 per trip. (CPFF 116). (Clear Lake Shuttle Bus Access Fees at BOT 017260 – 69 (Comp. App. 1766); Royal Carriages Access Fees at BOT 017402 – 04 (Comp. App. 1908). Prior to 2008, the Wharves invoiced limousines accessing the Cruise Terminal. However, with a few exceptions, limousines are typically from out of town and access the terminal irregularly; some accessed the Cruise Terminal two times a week while others did so two times a year. Compared to local users, such as the Complainants, their overall access to the Cruise Terminal appears to be quite small. Historically, it has been difficult to get limousines to pay these fees. Attempting collection efforts for such small fees has not been economically feasible. On September 13, 2008 Hurricane Ike made landfall on Galveston Island and devastated the island. This storm also disrupted Cruise Terminal operations for a while. When operations resumed and passengers returned to the Terminal billing for limousines was not resumed. The employee at the gate stopped keeping track of limousines and the billing stopped. Following the work of the Access Fee Study Group, the Wharves determined once again to invoice and collect Access Fees from limousine companies. Some companies have ceased to service the Terminal because of this. Others have not paid. The Wharves pulled the permit for one such company in 2015 and this company began to try to unload passengers on Harborside Drive, adding to congestion and traffic jams. That situation is ongoing. (Affidavit of Mark Murchison ¶¶ 24-27, Resp. App. Tab. No. 77 at p. 002086-002087).

66. In lieu of the Access/Trip fee, the access fees imposed by the Wharves Board from December 17, 2007 through June 30, 2014 on "Off-Port Parking Users" was \$8.00 per month per

parking space located in the Off-Port Parking User's parking facility. (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111)(5th Revised Page 3-F) at 3-F, n. D (ALJ App. 444)).

Response: Respondents object to this proposed finding because it mischaracterizes the language of the Tariff. (Wharves – Tariff Circular No. 6 (Item 111), revised August 28, 2006, BOT_017544-017618 (Resp. App. Tab. No. 2 at p. 000074-000148); Wharves – Tariff Circular No. 6 (Item 111), revised December 17, 2007, BOT_017619-017689 (Resp. App. Tab. No. 3 at p. 000148 -000219); Wharves – Tariff Circular No. 6 (Item 111), revised May 19, 2014, BOT_017775-017857 (Resp. App. Tab. No. 5 at p. 000304-000386). Complainants were previously charged a per-trip access fee until they requested a flat rate per-space fee. (Cindy Hayes letter dated June, 14, 2005, BOT_010819 (Resp. App. Tab. No. 51 at p. 001765); (Cindy Hayes letter dated October 15, 2005, BOT_010815 (Resp. App. Tab. No. 53 at p. 001773); (Michael Mierzwa letter date July 20, 2006, BOT_010816-010818 (Resp. App. Tab. No. 54 at p. 001774-001776); (Depo. of George Templeton at 40:12-40:25 (Resp. App. Tab. No. 83 at p. 002531); “Shuttle Diplomacy” Article in July 31, 2006, edition of The Daily News, EZC_A_001811-001813 (Resp. App. Tab. No. 45 at p. 001749); Affidavit of Michael Mierzwa (Resp. App. Tab. No. 75 at p. 002070-2078). Further, as noted above this flat fee rate only applied to Complainants and not these hotels. Further, not all local hotels/motels can be presumed to access the cruise terminal. Only those who accessed it to unload and load cruise passengers were obligated to pay an access fee. Access Fees assessed against Complainants during the time period mentioned above, were not in lieu of an access fee, but were instead in furtherance of Complainants’ request. *Id.*

67. The Tariff effective between December 17, 2007 and June 30, 2014 expressly provided the methodology for determining annual increases to monthly Access Fees charged to Off-Port Parking Users based on consumer price index (C.P.I.) growth. *Id.*

Response: Respondents admit that the Wharves Board promulgated a version of Tariff Circular No. 6 in December of 2007, which allowed for the ability to increase the monthly access fees charged to Off-Port Parking Users after 2011 using a Consumer Price Index (CPI) calculation. Respondents additionally assert that Tariff Circular No. 6 was initially promulgated in 2003. Wharves–Tariff Circular No. 6, (Item 111) approved November 14, 2003, BOT_017471-017543 (Resp. App. Tab. No. 1, pgs. 1-73). The tariff revision which first set out the Off-Port Parking User classification requested by Complainants was approved on August 28, 2006. Wharves–Tariff Circular No. 6, (Item 111) approved August 28, 2006, BOT_017544-017618 (Resp. App. Tab. No. 2, pgs. 74-148).

68. The Wharves Board failed to implement such increases in 2011, 2012, or 2013. (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111 at 3-F, n. D (ALJ App. 444); Complainants’ First Amended Verified Complaint at p. 9 (ALJ App. 1)).

Response: Respondents object because the Complainants improperly cite to their own complaint as evidence to support their finding. Respondents further object on ground of relevance. Subject to the foregoing objections, Respondents admit that no increases were made to the Off-Port Parking User access fee rates in 2011, 2012, or 2013.

69. On April 22, 2013, the Wharves Board considered an interim report from an internal study team assembled to conduct research on how other ports handle the issue of assessing access fees to offsite operators, specifically in regard to the Port of Galveston's Access Fees that were (or were not) being charged to different private parking lot owners, hotels, and shuttle buses who enter into the Cruise Terminal. (Minutes of the Regular Monthly Meeting of the Board of Trustees of the Galveston Wharves, Monday, April 22, 2013, pp. 7 – 8 (ALJ App. 450)).

Response: Denied. The summation of the entry is incomplete and inaccurate. The “study team” was requested to look “at the Port's access fees that are charged to different private parking lot owners, hotels, and shuttle buses that enter into the cruise terminal.” (Comp. App. 450, p.457). Further the study team's scope was “not really just for those who operate parking interests, but also those who operate limousines, buses, taxis and other shuttle services.”

Further, this analysis and study was ultimately performed for consideration of the \$28.88 per space access fee which was never put into effect. No tariff has been implemented and enforced which relied upon or forms the basis of this study. The proposed finding is not relevant to any claim in this proceeding.

70. In the meeting, Respondents' own internal team informed them that, although there was a policy for access fees in place (contained in the Tariff), procedures still needed to be implemented for purposes of its enforcement. *Id.* at p. 7.

Response: Denied as characterized and because it fails to accurately summarize the document. The minutes state:

There is a policy in place, Mr. Simons stated, but there are some adjustments that need to be made in terms of our implemented procedures

***Id.* Further, this analysis and study was ultimately performed for consideration of the \$28.88 per space access fee which was never put into effect. No tariff enforced which relied upon or forms the basis of this study. The proposed finding is not relevant to any claim in this proceeding.**

71. Further, it was also noted that “[t]he scope isn't really just for those who operate parking interests, but also those who operate limousines, buses, taxis and other shuttle services.” *Id.* (emphasis added).

Response: Objection. This proposed finding is ambiguous and out of context. Subject to that, admitted that the meeting minutes reflect this language in the document referenced. Further, this analysis and study was ultimately performed for consideration of the \$28.88 per

space access fee which was never put into effect. No tariff enforced which relied upon or forms the basis of this study. The proposed finding is not relevant to any claim in this proceeding.

72. The Wharves Board amended the Tariff on November 21, 2013, increasing Decal and Access Fees. (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 1 11)(6th Revised Page 3-F and 3-G), Notes C and D (ALJ App. 460)).

Response: Denied. In late 2013 Wharves' staff recommended some increases in charges for Access Fees. These recommendations included a proposed increase for Off-Port Parking Users from \$8 per space to \$9.14 per space. While other Access Fee increases were approved, the increase to \$9.14 per space was not approved by the Board of Trustees. Thereafter, Wharves' employees posted the changes to the Tariff on the Wharves' website. The changes inadvertently included the proposed increase to \$9.14 per space per month, which had not been approved. Once discovered, this erroneous posting on the Wharves' website was corrected. (Affidavit of Mark Murchison ¶17, Resp. App. Tab. No. 77 at p. 002085).

73. This amended Tariff was never implemented or enforced. (Complainants' First Amended Verified Complaint at p. 10 (ALJ App. 1)).

Response: Denied. Respondents object to this proposed finding of fact because Complainants cite their own complaint as evidence. Subject to the forgoing objections and without waiting same, the November 2013 Tariff was not approved by the Board. It was inadvertently included in the published Tariff. Once the mistake was caught it was removed. (Affidavit of Mark Murchison ¶17, Resp. No. Tab. No. 77 at p. 002085).

74. On May 12, 2014, the Special Finance Committee for the Wharves Board deliberated upon issues relating to cruise terminal parking, and placed two items on the agenda: (1) Parking Access Fees, and (2) Amendment to the Tariff. (Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14 (ALJ App. 418)).

Response: Respondents object to this proposed finding because Complainants rely upon statements made by an unidentified individual during discussion at the May 12, 2014, Special Finance Committee Meeting. The statements voiced are merely the opinions of a single individual and does not reflect any opinion or decision of the Board of Trustees. Affidavit of Michael Mierzwa (Resp. App. Tab. No. 75 at p. 002070); Affidavit of Mark Murchison (Resp. App. Tab. No. 77 at p. 002081); Affidavit of Peter Simons (Resp. App. Tab. No. 76 at p. 2078). Respondents further object to this proposed finding because the document cited is not the best source of the asserted statement. It is not an official document of the Wharves. Further, the speakers in the transcript are identified solely as "Unidentified Speaker." As such the use of a transcript which does not even identify sources of information is not only hearsay but cannot give rise to any hearsay exception because it fails to identify whether the person speaking has any relationship to the Port or

had the authority to bind the Board of Trustees as an entity to any statements made by this unidentified person. Further, this meeting discussed analysis and study which was ultimately performed for consideration of the \$28.88 per space access fee which was never put into effect. No tariff has been enforced which relied upon or forms the basis of this study. The proposed finding is not relevant to any claim in this proceeding. Respondents also object because the term "Parking Access Fees" as used in the proposed finding is misleading. The topic of access fees as discussed in the cited meeting included access to the terminal by all commercial users, not just parking lots. Finally, Respondents object to this proposed finding as irrelevant since the Tariff discussed in the May 12, 2014, Special Finance Committee Meeting is no longer in place and no longer at issue. Wharves – Tariff Circular No. 6 (Item 1 11) revised September 22, 2014, (Resp. App. Tab. No. 6 at p. 000387-000400).

75. On May 19, 2014, the Wharves Board adopted an amendment to the Tariff, which increased Access Fees charged for access to the Cruise Terminal, effective July 1, 2014. (Minutes of the Regular Monthly Meeting of the Board of Trustees of the Galveston Wharves, Monday, May 19, 2014 (ALJ App. 472)).

Response: Respondents object to this proposed finding as irrelevant since the Tariff discussed in the May 12, 2014, Special Finance Committee Meeting is no longer in place and no longer at issue. (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 1 11) revised September 22, 2014, (Resp. App. Tab. No. 6 at p. 000387-000400). Respondents admit that the Wharves Board adopted an amendment to the Tariff, which provided for, among other things, an increase in Access Fees charged to all commercial users that access the Cruise Terminal. Respondents deny that the description of the amendments is properly described.

76. Effective July 1, 2014, the access fees imposed by Respondent Wharves Board were as follows: (1) Charter bus owners and operators: \$60.00 Parking Fee; (2) Commercial passenger vehicle, courtesy vehicle, shuttle or limousine with seating capacity of fifteen persons or more: \$30.00 per Access/Trip; (3) Commercial Passenger Vehicle, courtesy vehicle, shuttle or limousine with seating capacity of less than fifteen persons: \$20.00 per Access/Trip; (4) Taxicabs with City of Galveston permit: \$0.00 per Access/Trip. (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 1 11)(7th Revised Page 3-F and 3-G); (ALJ App. 466)).

Response: Respondents object to this proposed finding to the extent it implies that taxis were not charged anything at all. To the contrary, taxis were charged an annual decal fee of \$7.50 per vehicle under the Tariff. Wharves – Tariff Circular No. 6 (Item 111) revised May 19, 2014, (Resp. App. Tab. No. 5 at p. 000304-000386). Respondents further object to this proposed finding as irrelevant since the Tariff effective July 1, 2014, is no longer in place and no longer at issue. Wharves – Tariff Circular No. 6 (Item 111) revised September 22, 2014, (Resp. App. Tab. No. 6 at p. 000387-000400). Otherwise, admit.

77. In lieu of the Access/Trip fee, effective July 1, 2014, "Off-Port Parking Users" were subject to a monthly Access Fee equal to the amount of \$28.88 per parking space located in the Off-Port Parking User's parking facility. *Id.* at 3-F, n. D; *see also* Minutes of the

Regular Monthly Meeting of the Board of Trustees of the Galveston Wharves, Monday, May 19, 2014 at p. 14 (ALJ App. 472).

Response: Respondents object to this proposed finding as irrelevant since the Tariff effective July 1, 2014, is no longer in place and no longer at issue. (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111) revised September 22, 2014, (Resp. App. Tab. No. 6 at p. 000387-000400). When the Tariff effective July 1, 2014, was rescinded in September of 2014, all moneys collected under this Tariff were refunded. Affidavit of Mark Murchison ¶19 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Michael Mierzwa ¶32 (Resp. App. Tab. No. 75 at p. 002075; Wharves—Regular Monthly Meeting Minutes, September 22, 2014, BOT_015654 (Resp. App. Tab. No. 26 at p. 002618).

78. The access fee changes that took effect on July 1, 2014 were projected to result in an increase of \$430,000.00 in Access Fees collected by the Wharves Board. (Minutes of the Regular Monthly Meeting of the Board of Trustees of the Galveston Wharves, Monday, May 19, 2014, at p. 14 (ALJ App. 472)).

Response: Respondents object to this proposed finding as irrelevant since the Tariff effective July 1, 2014, is no longer in place and no longer at issue. (Board of Trustees of the Galveston Wharves – Tariff Circular No. 6 (Item 111) revised September 22, 2014, (Resp. App. Tab. No. 6 at p. 000387-000400). When the Tariff effective July 1, 2014, was rescinded in September of 2014, all moneys collected under this Tariff were refunded. Affidavit of Mark Murchison ¶19 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Michael Mierzwa ¶32 (Resp. App. Tab. No. 75 at p. 002075). Wharves—Regular Monthly Meeting Minutes, September 22, 2014, BOT_015654 (Resp. App. 26 at p. 002618). Respondents admit that Peter Simon referenced this projection to the Board in the referenced document.

79. The Wharves Board owns and/or operates sixty-eight (68) percent of the parking spaces available for cruise passengers. *Id.* at p. 11; *see also* Depo. M. Mierzwa at 141:8 – 142:7 (ALJ App. 293).

Response: Respondents object to this proposed finding because as originally written Complainants did not provide a citation for their finding. Respondents object to this proposed finding as misleading, mischaracterizing testimony and irrelevant. The specific citation proffered to support this fact is improperly referenced and misleading to create an untrue statement. . The interchange between Mr. Mierzwa and Complainants' counsel involved the counsel reading from a document discussed as Exhibit 9 to Mr. Mierzwa's deposition (introduced for the deposition at Comp. App. 310). Mr. Mierzwa was then asked questions as to his interpretations of what the counsel claimed to be reading at the time. Mr. Mierzwa was asked about a statement in 2014, relating to a parking review by Port Staff in May of 2014 and how those particular percentages were determined at that time. The proposed finding suggests that for all times relevant to this proceeding, the percentages stated were in effect, so that Complainants can then attempt to use those to bolster their reparation claim. However, there is no evidence of any kind that these percentages were in effect for all times relevant. Respondents further object that the document referenced provides the Wharves' percentage of ownership other than in 2013. Complainants have

not cited any information which would indicate that this percentage of ownership is accurate for any time prior to or after 2013. Subject to and without waiving the foregoing objections, Respondents admit that in 2013 the Wharves Board owned and operated approximately sixty-eight percent (68%) of parking spaces available to cruise ship passengers.

80. Complainant 81st Dolphin owns/operates three and one half (3.5) percent, Complainant EZ Cruise owns/operates eleven (11) percent, and Complainant Lighthouse owns/operates five and seven tenths (5.7) percent of the parking spaces available for cruise passengers. *Id.*

Response: Respondents object to this proposed finding because as originally written Complainants did not provide a citation for their finding. Respondents object to this proposed finding as misleading, mischaracterizing testimony and irrelevant. The specific citation proffered to support this fact is improperly referenced and misleading to create an untrue statement. The interchange between Mr. Mierzwa and Complainants' counsel involved the counsel reading from a document discussed as Exhibit 9 to Mr. Mierzwa's deposition (introduced for the deposition at Comp. App. 310). Mr. Mierzwa was then asked questions as to his interpretations of what the counsel claimed to be reading at the time. Mr. Mierzwa was asked about a statement in 2014, relating to a parking review by Port Staff in May of 2014 and how those particular percentages were determined at that time. There is no evidence offered to support this Finding. According to Complainants' Brief, this is nothing more than an unsupported extrapolation of the number of the trips each user accessing the Cruise Terminal in the first six months of 2006. There is no reliable methodology offered to support what Complainants offer in this proposed finding.

81. In December of 2010, the Wharves Board entered into an Economic Development Agreement with Carnival Corporation ("Carnival") and GPFC, whereby Carnival partnered with the Wharves Board in its cruise parking operation to increase its market share in exchange for twenty-five (25%) percent of revenues over \$2.5 million dollars. (Depo. M. Mierzwa at 58:21 – 61:12 (ALJ App. 293)).

Response: Respondents object to this proposed finding to the extent that it implies that the Port is not allowed to market its parking facilities. Furthermore, the Access Fees complained of were increased approximately four years after the signing of the referenced agreement. December 1, 2010, Economic Development Agreement, BOT_013175-013191 (Resp. App. Tab. No. 21 at p. 001448-001464). This is too remote of a connection to support Complainants' implication that the Wharves increased the access fees in order to increase its market share. Also the deposition excerpt of Mr. Mierzwa referenced, Depo. M. Mierzwa at 58:21 – 61:12 (Comp. App. 293), mischaracterizes his testimony. Mr. Mierzwa testified that Carnival Corporation wanted the Agreement because it was planning on bringing two larger ships, Carnival Triumph and Magic, which would provide approximately an additional 1,400 to 1,500 per call between the two vessels. He then testified that Carnival wanted a share. of the increased parking revenue it believed the Wharves would receive at its own parking lots in exchange for providing these larger vessels. *Id.* Respondents admit that among other terms, in Exhibit C of a connection to

support Complainants' implication that said agreement, Carnival Corporation (identified as "Operator" in the agreement) agreed to use reasonable commercial efforts working with the Wharves Board increased to jointly increase its current market share of parking captured by the Wharves. *Id.* at BOT 10866 (listing six items which the Operator would use reasonable efforts to do for the Wharves). Respondents also admit that under Section 3.02(a) of that Agreement, the Wharves agreed that

- (a) Wharves will pay Operator an amount equal to (i) 12.5% of that portion of Parking Revenues that exceed the Threshold, during any period of time that one of the Replacement Vessels is performing Year Round Operations from the Berth, and (ii) 25% of that portion of Parking Revenues that exceed the Threshold, during any period of time that two or more Replacement Vessels are performing Year Round Operations from the Berth.
- (b) The "Threshold" means Wharves' annual parking revenues, net of sales tax, that result from Operator's Cruise Operations from the Berth in an amount that equals \$2.5 million.

Id. at BOT 10854).

82. Collectively, Complainants parking spaces for which they were subject to monthly Access Fees totaled approximately 778 parking spaces on July 1, 2014. (Complainants' First Amended Verified Complaint (ALJ App. 1)).

Response: Respondents object to the above proposed finding because it is unsupported by a proper citation. Complainants cite their own complaint for the "proof" of this proposition which is improper. Respondents object to this proposed finding as irrelevant since the Tariff effective July 1, 2014, is no longer in place and no longer at issue. Wharves – Tariff Circular No. 6 (Item 111) rescinded September 22, 2014, (Resp. App. Tab. No. 6 at p. 000387); Affidavit of Mark Murchison ¶19 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Michael Mierzwa ¶32 (Resp. App. Tab. No. 75 at p. 002075).

83. At \$8.00 per parking space per month, the Access Fees for 778 parking spaces would be \$6,224.00 per month, or \$74,688.00 per year. At \$28.88 per parking space per month, the Access Fees for 778 parking spaces would be \$22,468.64 per month, or \$269,623.68 per year. The difference in those Access Fees equals \$194,935.68, or slightly over forty-five (45) percent of the projected increase in Access Fees collected by the Wharves Board following the July 1, 2014 implementation of the Tariff amendment. (Minutes of the Regular Monthly Meeting of the Board of Trustees of the Galveston Wharves, Monday, May 19, 2014 at p. 14 (stating expected increase in Access Fees collected was \$430,000.00) (ALJ App. 472)).

Response: Respondents object to this proposed finding as irrelevant since the Tariff effective July 1, 2014, is no longer in place and no longer at issue. Wharves – Tariff Circular No. 6 (Item 111) revised September 22, 2014, (Resp. App. Tab. No. 6 at p. 00387). When the Tariff effective July 1, 2014, was rescinded in September of 2014, all moneys collected under this Tariff were refunded. Affidavit of Mark Murchison ¶19 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Michael Mierzwa ¶32 (Resp. App. Tab. No. 75 at p.

002075); Wharves—Regular Monthly Meeting Minutes, September 22, 2014, BOT_015654 (Resp. App. Tab. No. 87 at p. 002618).

84. One of the Wharves Board's considerations in adopting the Tariff amendment which became effective July 1, 2014 was to increase the Wharves Board's market share of cruise passenger parking. (Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 32:17-20 (ALJ App. 418)).

Response: Respondents object to this proposed finding because Complainants rely upon statements made by an unidentified individual during discussion at the May 12, 2014, Special Finance Committee Meeting. The statements voiced are merely the opinions of a single individual and does not reflect any opinion or decision of the Board of Trustees. Please see the aforementioned objections to the cited audio transcription. Respondents further object to this proposed finding because it is not supported by any evidence. Respondents deny that the Wharves Board adopted the Tariff effective July 1, 2014, in order to increase its market share. Affidavit of Peter Simons at ¶ 4 (Resp. App. Tab. No. 76 at p. 002078).

85. Prior to adopting the Tariff changes that became effective on July 1, 2014, the Wharves Board conducted a study to determine what those changes should be. (Depo. M. Mierzwa at 142:18 – 143:17, 145:25 – 146:13, and 151:23 – 152:2 (ALJ App. 293)).

Response: Respondents object to this proposed finding because as originally written it was uncited. Otherwise, admit.

86. That study considered historical data of access to the Cruise Terminal by hotel/motel shuttles, "coach type buses," and similar companies accessing the Cruise Terminal. *Id.*

Response: Respondents object to this proposed finding because as originally written it was uncited. Respondents further object that the proposed finding mischaracterizes Mr. Mierzwa's testimony. Additionally, this analysis was ultimately performed for consideration of the \$28.88 per space access fee which was never implemented. The proposed finding is not relevant to any claim in this proceeding. Subject to the foregoing objections, Respondents

87. The study did not consider historical data of Complainants' access to the Cruise Terminal. *Id.*

Response: Respondents object to this proposed finding because as originally written it was uncited. Respondents further object that the proposed finding mischaracterizes Mr. Mierzwa's testimony. Additionally, this analysis was ultimately performed for consideration of the \$28.88 per space access fee which was never implemented. The proposed finding is not relevant to any claim in this proceeding. Respondents further object to the extent this proposed finding implies that Respondents' study was required to consider historical data of Complainants' access of the Cruise Terminal without any basis for this implication. Otherwise, admit.

88. The study did not consider the parking spaces utilized by hotels/motels to park cruise passengers' vehicle. *Id.*

Response: Respondents object to the extent this proposed finding implies that Respondents' study was required to consider the parking spaces utilized by hotels and motels, without any basis for this implication. Otherwise, admit.

89. The Wharves Board acknowledged that, as of September 22, 2014, they "still [had] enforcement issues" regarding Access Fees. (Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 9/22/14, at 8:22 – 9:10 (ALJ App. 534)).

Response: Objection. The unofficial transcription, objected to previously and herein again objected to, describes a meeting of the Galveston Wharves Board not the Finance Committee as referenced in this proposed finding.

Objection, misleading and mischaracterizes the transcript. The person speaking is the Port Deputy Director Peter Simon responding to an inquiry as to why a parking lot operator who does not actually access the cruise terminal did not have to pay a fee. No vote or decision making such an acknowledgement is reflected on any page of the document. Further, the quote attributed to Mr. Simon is out of context and incomplete. It states on the designated pages:

TRUSTEE RICHARD DEVRIES: But this wont, we won't capture any money from, let's say the guy right next door here, he still, he gets a free pass.

TRUSTEE MICHAEL MIERZWA: He, they are not accessing the terminal. And so this would not capture any money from a park and walk operation.

TRUSTEE RICHARD DEVRIES: That doesn't seem very fair to everybody else.

TRUSTEE MICHAEL MIERZWA: They're not; it's an access fee so, for them bringing their vehicles onto the Port.

TRUSTEE RICHARD DEVRIES: I think maybe I need to say something now.

TRUSTEE PETER SIMONS: Well and for the record, the Access Fee Working Group will continue to look at these issues, we still have enforcement issues, and we still have the issues of how we deal with the operator on "new strand" so the working group will continue to look at that but with respect to the tariff, the sense and I would say consensus was that the tariff could not reach that operator because he is not accessing the cruise terminal and the Port property.

(Audio Transcription of The Board of Trustees of the Galveston Wharves Meeting on 9/22/14, at 8:22 – 9:10 (ALJ App. 534)) (Note that Mr. Mierzwa and Mr. Simon are inaccurately described as “Trustees”).

90. On September 22, 2014, the Wharves Board made a further Tariff change to become effective October 1, 2014, whereby the distinction of “Off-Port Parking Users” was removed, and Complainants would be charged a per Access/Trip fee instead of an access fee based on the number of parking spaces Complainants owned/operated. (Depo. M. Mierzwa at 153:21- 25 (ALJ App. 293); Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014, at p. 12 (ALJ App. 534)).

Response: Objection. The unofficial transcription, objected to previously and herein again objected to, describes a meeting of the Wharves Board not the Finance Committee as referenced in this proposed finding.

Admit that the language in said Tariff subjecting “Off-Port Parking Users” to a flat fee was eliminated by the resolution adopted on the date stated in the proposed finding. Denied in that in this amendment Off-Parking users are still noted in Note D. of the 9/22/2014 Tariff as well as defined in the tariff. The Note indicates that prior to October 1, 2014, the off-parking users are subject to an \$8.00 per parking space located in the off-Port Parking user's parking facility in lieu of the access/fee trip rescinding the \$28.88 flat fee approved in June of 2014. (Tariff No. 6, Resp. App. Tab. No. 2 at p. 000090 (BOT_017560)).

91. Prior to October 1, 2014, the Wharves Board historically has not charged Complainants per-trip Access Fees based upon their proportional volume of traffic in the Cruise Terminal like other Cruise Terminal users. (Depo. M. Mierzwa at 68:21 – 69:18; 141:8 - 142:7; 145:13 - 146:13 (ALJ App. 293)).

Response: Objection. The testimony proffered for proof of these assertions does not speak to this proposed finding. Objection to the extent this proposed finding implies that charging fees based on proportional volume of traffic was required or even appropriate.

Subject to that objection, admitted in part and denied in part. In 2006, the Port Staff did review the Complainants volume of traffic in negotiations with Complainants which resulted in a flat fee arrangement. See Notice to Commercial Vehicles Services – Port Users, page 4 (Resp. App. Tab No. 104 at p. 002785, BOT_011054). Affidavit of Michael Mierzwa at ¶ 15 (Resp. App. Tab. No. 75 at p. 002072); Steven M. Cernak notice to Port users, May 20, 2005, EZC_A_005577-5583 (Resp. App. Tab. No. 50 at p. 001758-001764).

Admit that since August of 2006 no fees charged to Complainants for access were based solely on their proportional volume of traffic.

92. The Tariff promulgated by the Wharves Board prior to the September 22, 2014 amendment, which took effect on October 1, 2014, treated Complainants differently than other Cruise Terminal users subject to the Tariff. (Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on September 22, 2014, at p. 4

(ALJ App. 534); Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 22:13-15 (ALJ App. 418)).

Response: Objection. The unofficial transcription, objected to previously and herein again objected to, also describes a meeting of the Wharves Board not the Finance Committee as referenced in this proposed finding.

Subject to that objection, admit and Denied in Part. Admit that prior to August 1, 2006, Complainants were charged a per trip fee for access, but refused to pay it requesting a flat fee instead. Admit that from August 15, 2006 through October 1, 2014, Complainants were charged a flat rate fee for parking while other users were charged a per trip fee. Denied that this was prejudicial to Complainants or that other users were treated preferentially. Also denied that other users were similarly situated to Complainants.

93. Prior to adopting the Tariff changes that became effective on October 1, 2014, the Wharves Board did not conduct a study to determine Complainants' proportional use of the Cruise Terminal. (Depo. M. Mierzwa at 155:1-5 (ALJ App. 293)).

Response: Objection to the extent this proposed finding implies that charging fees based on proportional volume of traffic was required or even appropriate. Subject to this objection, admit that no such study was performed.

94. Prior to adopting the Tariff changes that became effective on October 1, 2014, the Wharves Board considered "a very small sample size" and "felt" that charging an Access/Trip fee of \$20.00 per trip to Complainants would accomplish the Wharves Board's target revenue from Access Fees. *Id.* at 155:9 – 156:1, 157:13 – 158:2.

Response: Objection. The cited page references proffered as proof of this finding were not included in Complainants' Appendix (See Comp. App. 293, pp. 313-314).

95. More cruise ships berthed at the Cruise Terminal in 2006 than in any year since. (Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on 5/12/14, at 9:18-24 (ALJ App. 418)).

Response: Objection. The unofficial transcription, objected to previously and herein again objected to, also describes a meeting of the Wharves Board not the Finance Committee as referenced in this proposed finding.

Admit that the following information reported in the Port's 2014 CAFR accurately reflects the ships calls and passenger count for years 2005 through 2014:

Year	Cruise Ship Calls	Cruise Passengers	Vehicles Parked
2005	233	532,241	73,572
2006	253	616,939	78,905
2007	207	523,303	68,230
2008	133	376,815	53,162
2009	139	394,640	56,786
2010	152	434,524	58,378
2011	152	459,448	59,466
2012	174	604,272	77,624
2013	179	604,994	73,395
2014	181	641,650	87,422

See Affidavit of Mark Murchison ¶29 (Resp. App. Tab No. 77 at p. 002087), and attached 2014 Comprehensive Annual Financial Report (“CAFR”) for the Galveston Wharves, Resp. App. Tab No. 77 at p. 002089).

96. The local hotel “Holiday Inn on the Beach” purchased a permit pursuant to the Tariff, for their fifteen (15) person capacity vehicle to transport cruise passengers that parked at the hotel to and from the Cruise Terminal. (Holiday Inn on the Beach – Shuttle Permit Purchase (BOT 011964) (ALJ App. 548)).

Response: Respondents object to this proposed finding because Complainants’ assertion is misleading and mischaracterizes the evidence because a) the document cited is one of several sheets showing decals issued for the calendar year of 2007. (Decal Permit Information for 2007 (Resp. App. Tab. No. 74 at p. 001951). Complainants have not cited any evidence to suggest that the vehicles registered in 2007 were used by this Port user in the years before or after this registration. b) Complainants have not cited any evidence to indicate, which of the registered vehicles accessed the Terminal at any given time. Additionally, while Complainants refer to a local hotel names “Holiday Inn on the Beach” no such hotel exists. There are two Holiday Inns that access the Cruise Terminal (both are on the Seawall so they are both technically “on the beach”- Holiday Inn and Holiday Inn Sunspree. Invoices cited are for Holiday Inn.

97. Between January 1, 2008 and June 30, 2014, Respondents recorded 213 accesses by this hotel to the Cruise Terminal. (Invoices – Galveston Wharves (Holiday Inn) at BOT 016355 – 016377 (ALJ App. 549)).

Response: Denied. The hotel in question accessed the Cruise Terminal 241 times from January 2008 through July 2011. Invoices –Holiday Inn at BOT 016355 – 016377 (Comp. App. 549). There were no recorded accesses for this hotel after July of 2011. Furthermore, Respondents note that Complainants have arbitrarily picked the January 1, 2008, through June 30, 2014, time period. The Holiday Inn began paying access fees in 2005. *Id.* at BOT 016326 – 016377 (Comp. App. 549)).

98. Every documented access to the Cruise Terminal by “Holiday Inn on the Beach” during that time showed that hotel being charged an Access Fee of \$10.00 per Access/Trip. *Id.*

Response: Admit that a \$10 charge is reflected on the documents presented. However, this proffer does not prove that such a charge was made for any trips not depicted on the records.

99. The local hotel “Moody Gardens, Inc.” purchased permits for six vehicles from the Wharves Board; five with a seating capacity of eighteen (18) persons, and one with a seating capacity of fifteen (15) persons. (Moody Gardens, Inc. – Shuttle Permit Purchase (BOT 012120) (ALJ App. 572)).

Response: Respondents object to this proposed finding because Complainants’ assertion is misleading and mischaracterizes the evidence because: a) the document cited is one of several sheets showing decals issued for the calendar year of 2007. Decal Permit Information for 2007, (Resp. App. Tab. No. 74 at p. 001951). Complainants have not cited any evidence to suggest that the vehicles registered in 2007 were used by this Port user in the years before or after this registration. b) Complainants have not cited any evidence to indicate, which of the registered vehicles accessed the Terminal at any given time.

100. Between January 1, 2008 and June 30, 2014, Moody Gardens, Inc. was documented as accessing the Cruise Terminal 3,511 times, and was charged an Access Fee of \$10.00 per Access/Trip. (Invoices – Galveston Wharves (Moody Gardens) (ALJ App. 573)).

Response: Denied. The Mood Gardens Hotel accessed the Cruise Terminal 1,830 times during the referenced period. Invoices—Moody Gardens at BOT_016832-016909 (Comp. App. 573). Complainants have arbitrarily picked the January 1, 2008, through June 30, 2014 time period. The Moody Gardens Hotel has been paying access fees to the Cruise Terminal since 2005. *Id.* at BOT_016806-016831.

101. For the months of May, June, September, and November of 2008, and February of 2009, only Claimants were charged Access Fees although fifty-five cruise ships called on the Cruise Terminal. (Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008) (ALJ App. 35), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) (ALJ App. 38)).

Response: Denied. Among others, the hotels listed by Complainants were charged during these months: (1) Holiday Inn was billed for May, June, and November of 2008; (2) Moody Gardens was billed for all of these months but September of 2008; (3) San Luis was billed for all of these months but September of 2008. (Invoices—Wharves (Holiday Inn) at BOT_016322-16325 (Comp. App. 573); (Invoices—Wharves (Moody Gardens) at BOT_016798-016805 (Comp. App. 573); (Invoices—Wharves (San Luis) at BOT_016922-016928 (Comp. App. 573)). On September 13, 2008, Hurricane Ike struck Galveston resulting in tremendous devastation to Island inhabitants and the temporary closing of the Port of Galveston. Affidavit of Michael Mierzwa at ¶26 (Resp. App. Tab. No. 75 at p. 002073); Wharves—2012 Comprehensive Annual Financial Report at BOT_014452 (Resp.

App. Tab. No. 15 at p. 001239). As a result of this event, the Port did not charge access fees for the month of September 2008 (and in some instances the surrounding months). (Affidavit of Michael Mierzwa ¶26 (Resp. App. Tab. No. 75 at p. 002073). Invoices issued for this month were forgiven with proof of closing. *Id.* This opportunity was offered to everyone, including Complainants. Email Correspondence between Mark Murchison and Charles Tompkins, BOT_011572-011573 (Resp. App. Tab. No. 57 at p. 001788-001789). EZ Cruise was not billed for the time that it was closed following Hurricane Ike. (Invoices—Wharves (EZ Cruise) at BOT_016115 (Comp. App. 58, p. 68).

102. During those months not one single entity was charged an Access Fee other than Complainants.² (Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008) (ALJ App. 35), Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) (ALJ App. 38)).

Response: Denied. Among others, the hotels listed by Complainants were charged during these months: (1) Holiday Inn was billed for May, June, and November of 2008; (2) Moody Gardens was billed for all of these months but September of 2008; (3) San Luis was billed for all of these months but September of 2008. Invoices—Wharves (Holiday Inn) at BOT_016322-16325 (Comp. App. 573); Invoices—Wharves (Moody Gardens) at BOT_016798-016805 (Comp. App. 573); Invoices—Wharves (San Luis) at BOT_016922-016928 (Comp. App. 573). On September 13, 2008, Hurricane Ike struck Galveston resulting in tremendous devastation to Island inhabitants and the temporary closing of the Port of Galveston. Affidavit of Michael Mierzwa at ¶26 (Resp. App. Tab. No. 75 at p. 002073); Wharves—2012 Comprehensive Annual Financial Report at BOT_014452 (Resp. App. Tab. No. 15 at p. 001239). As a result of this event, the Port did not charge access fees for the month of September 2008 (and in some instances the surrounding months). Affidavit of Michael Mierzwa at ¶26 (Resp. App. Tab. No. 75 at p. 002073). Invoices issued for this month were forgiven with proof of closing. *Id.* This opportunity was offered to everyone, including Complainants. Email Correspondence between Mark Murchison and Charles Tompkins, BOT_011572-011573 (Resp. App. Tab. No. 57 at p. 001788-001789). EZ Cruise was not billed for the time that it was closed following Hurricane Ike. Invoices—Galveston Wharves (EZ Cruise) at BOT_016115 (Comp. App. 58, p. 68).

103. Between January 1, 2008 and December 31, 2013, not a single limousine was charged an Access Fee. (Certificate of Summary (ALJ App. 768), Summary – Cruise Terminal Users Invoices for Access Fees (ALJ App. 769)).

Response: Respondents object to Complainants Certificate of Summary as evidence because it was prepared by Complainants' counsel's legal assistant and a cursory review of the summary shows it to be inaccurate. Complainants attempt to mislead the Judge by assuming that the name of a particular company limits the type of vehicle a particular company utilizes. When in actuality, most of these companies own several types of vehicles, including courtesy cars, limousines, shuttle buses and charter buses. Subject to the foregoing objections, Complainants have not cited any evidence to indicate, which of the various limousines and shuttle bus companies registered vehicles accessed the Terminal at any given time for which they were invoiced during the above stated period. By

Complainants' own argument and evidence Clear Lake Shuttle, Royal Carriages and Lone Star were invoiced during this period. Complainants Respondents do not have enough information to either confirm or deny whether the invoiced amount of \$10 per trip invoiced during this period was for limousines, courtesy vehicles or shuttle buses of up to fourteen passengers, all of which could have been charged a ten dollar access fee under the tariff. (Clear Lake Shuttle Access Fees at BOT 017260 – 69 (Comp. App. 1766).

Prior to 2008, the Wharves invoiced limousines accessing the Cruise Terminal. However, with a few exceptions, limousines are typically from out of town and access the terminal irregularly; some accessed the Cruise Terminal two times a week while others did so two times a year. Compared to local users, such as the Complainants, their overall access to the Cruise Terminal appears to be quite small. Historically, it has been difficult to get limousines to pay these fees. Attempting collection efforts for such small fees has not been economically feasible. On September 13, 2008 Hurricane Ike made landfall on Galveston Island and devastated the island. This storm also disrupted Cruise Terminal operations for a while. When operations resumed and passengers returned to the Terminal billing for limousines was not resumed. The employee at the gate stopped keeping track of limousines and the billing stopped. Following the work of the Access Fee Study Group, the Wharves determined once again to invoice and collect Access Fees from limousine companies. Some companies have ceased to service the Terminal because of this. Others have not paid. The Wharves pulled the permit for one such company in 2015 and this company began to try to unload passengers on Harborside Drive, adding to congestion and traffic jams. That situation is ongoing. (Affidavit of Mark Murchison ¶¶ 24-27, Resp. App. Tab. No. 77 at p. 002086-002087).

104. The first invoice after January 1, 2008 recording access to the Cruise Terminal by a limousine was issued to Avanti Transportation in April of 2014. (Invoices – Galveston Wharves (Avanti Transportation) at BOT 017224 (ALJ App. 1731)).

Response: Denied. Please see Respondent's response to Complainants' Proposed finding of fact No. 103. As stated above, there are invoices for other companies in 2012 and 2013.

105. Once Respondents' enforcement of collecting Access Fees under the Tariff "picked up," a number of limousines and buses that accessed the Cruise Terminal before such enforcement became delinquent in their accounts and stopped coming to the Cruise Terminal. (Audio Transcription of The Board of Trustees of the Galveston Wharves Special Finance Committee Meeting on March 30, 2015, at 5:23-6:3 (ALJ App. 749)).

Response: Objection to the term "picked up" as being vague, ambiguous and overly broad. Admit. Respondents further object to this proposed finding because the document cited is not admissible and has not been authenticated. This alleged "official" transcription of the March 30, 2015, Special Finance Committee Meeting was prepared by Complainants' counsel's legal assistant. (Comp. App. 749, p. 750). This transcription has never been authenticated as an accurate transcription of the events represented. No evidence has been offered to demonstrate that Ms. Fine, the legal assistant, is a certified court reporter or

otherwise legally qualified to make the transcription. Additionally, the transcription contains a number of inaccuracies, including but not limited to, the designation of W. Hulse Wagner (Wharves legal counsel) and Michael Mierzwa as Trustees.

Subject to the foregoing objections and without waiving these objections, prior to 2008, the Wharves invoiced limousines accessing the Cruise Terminal. However, with a few exceptions, limousines are typically from out of town and access the terminal irregularly; some accessed the Cruise Terminal two times a week while others did so two times a year. Compared to local users, such as the Complainants, their overall access to the Cruise Terminal appears to be quite small. Historically, it has been difficult to get limousines to pay these fees. Attempting collection efforts for such small fees has not been economically feasible. On September 13, 2008 Hurricane Ike made landfall on Galveston Island and devastated the island. This storm also disrupted Cruise Terminal operations for a while. When operations resumed and passengers returned to the Terminal billing for limousines was not resumed. The employee at the gate stopped keeping track of limousines and the billing stopped. Following the work of the Access Fee Study Group, the Wharves determined once again to invoice and collect Access Fees from limousine companies. Some companies have ceased to service the Terminal because of this. Others have not paid. The Wharves pulled the permit for one such company in 2015 and this company began to try to unload passengers on Harborside Drive, adding to congestion and traffic jams. That situation is ongoing. (See Affidavit of Colony Limo ¶3, Resp. App. Tab. No. 85 at p. 002585; Affidavit of Mark Murchison ¶¶24-27, Resp. App. Tab No. 77 at p. 002086-002087).

106. Between January 1, 2008 and June 30, 2014, the Wharves Board did not charge a single Access Fee greater than \$10.00. (Certificate of Summary (ALJ App. 768), Summary – Cruise Terminal Users Invoiced for Access Fees (ALJ App. 769)).

Response: Denied. Respondents object to Complainants Certificate of Summary as evidence because it was prepared by Complainants' counsel's legal assistant and a cursory review of the summary shows it to be inaccurate. Subject to the foregoing objections, by Complainants' own argument and evidence, there were \$50.00 per trip charges. (CPFF 116).; Royal Carriages Access Fees, BOT_017402-408 (Comp. App. 1908, pg. 1910-1916).

107. Respondents' 2006 record of access to the Cruise Terminal provides that, at that time, 81st Dolphin comprised approximately 8.8% of the total traffic subject to the Tariff that accessed the Cruise; EZ Cruise represented approximately 11.2%; and Lighthouse accounted for approximately 9.6% of same. (Depo. M. Mierzwa at 174:10 – 175:18 (ALJ App. 293); Port Tariff Charges for the Year 2006 (Access Fee Study) (ALJ App. 532)).

Response: Denied. The calculation used does not take into account that EZ Cruise was utilizing third party shuttles provided by Galveston Limo during the referenced period. (Cynthia Hayes letter dated June 14, 2005, BOT_010819-010820 (Resp. App. Tab. No. 51 at p. 001765-001766); Depo. of Cynthia Tompkins at 39:1-40:16 (Resp. App. Tab. No. 82 at p. 002474-002475). Total trips: 14,848 81st: 8.78% Lighthouse: 9.58% EZ Cruise (without Galv. Limo): 11.24% EZ Cruise (with Galv. Limo): 36.30% During the cited time period

Complainants made up 29.6-54.66% of Terminal traffic. Port Tariff Charges for the Year 2006 (Access Fee Study) (Comp. App. 532).

108. Respondents did not track Complainants' use of, or access to, the Cruise Terminal after 2006 until 2014. (Depo. M. Mierzwa at 145:25 – 146:13 (ALJ App. 293)).

Response: Respondents object to the use of the term “track” because it is vague and ambiguous. Subject to the foregoing objection, Respondents admit that during this time period, they did not count the trips made by Complainants because Complainants, unlike any other user, were allowed unlimited access for a flat fee. However, Respondents deny to the extent that in order to properly assess the flat fee, Respondents “tracked” Complainants lots and car counts which were directly related to the “use of and access to” the Cruise Terminal.

109. In 2014, the Wharves Board recorded 274 limousine accesses to the Cruise Terminal. (Certificate of Summary (ALJ App. 768), Summary – Cruise Terminal Users Invoiced for Access Fees (ALJ App. 769)).

Response: Denied. Respondents object to Complainants Certificate of Summary as evidence because it was prepared by Complainants' counsel's legal assistant and a cursory review of the summary shows it to be inaccurate. Complainants attempt to mislead the Judge by assuming that the name of the company determines the only type of vehicle a particular company utilizes. When in actuality, most of these companies own several types of vehicles, including courtesy cars, limousines, shuttle buses and charter buses. Subject to the foregoing objections, Complainants have not cited any evidence to indicate, which of the various limousines and shuttle bus companies registered vehicles accessed the Terminal at any given time for which they were invoiced during the above stated period.

110. From January 1, 2008 through December 31, 2013, no buses were charged Access Fees as required by the Tariff. *Id.*

Response: Denied. Respondents object to Complainants Certificate of Summary as evidence because it was prepared by Complainants' counsel's legal assistant and a cursory review of the summary shows it to be inaccurate. By Complainants' own argument and proposed finding of fact, buses were charged \$50.00 per trip. (CPFF 116). (Clear Lake Shuttle Bus Access Fees at BOT 017260 – 69 (Comp. App. 1766); Royal Carriages Access Fees at BOT 017402 – 04 (Comp. App. 1908).

111. Galveston Seawall Motel, LTD d/b/a Comfort Inn & Suites, purchased a permit for one vehicle with a seating capacity of twenty-five (25) to access the Cruise Terminal. (Comfort Inn – Shuttle Permit Purchase (BOT 011946 - 47) (ALJ App. 651)).

Response: Respondents object to this proposed finding because Complainants' assertion is misleading and mischaracterizes the evidence because: a) the document cited is one of several sheets showing decals issued for the calendar year of 2007. (Decal Permit Information for 2007 (Resp. App. Tab No. 74 at p. 001951). Complainants have not cited

any evidence to suggest that the vehicles registered in 2007 were used by this Port user in the years before or after this registration. b) Complainants have not cited any evidence to indicate, which of the registered vehicles accessed the Terminal at any given time.

112. Between January 1, 2008 and June 30, 2014, Respondents recorded Galveston Seawall Motel, LTD d/b/a Comfort Inn & Suites accessing the Cruise Terminal 184 times and charged an Access Fee of \$10.00 for each of those accesses. (Invoices – Galveston Wharves (Comfort Inn) at BOT 015846 – 54 (ALJ App. 653)).

Response: Denied. The Comfort Inn & Suites did not access the terminal in 2008 at all. Between 2009 and June 2014, it accessed the Cruise Terminal 2,004 times. (Invoices—Galveston Wharves (Comfort Inn) at BOT_015846-015854) (Comp. App. 653).

113. The San Luis Resort, Spa and Conference Center, a local hotel, purchased permits for four vehicles, one with a seating capacity of eighteen (25) persons, one with a seating capacity of fifteen (15) persons, and two with seating capacities of less than fifteen (15) persons. (San Luis Hotel – Shuttle Permit Purchase (BOT 011963) (ALJ App. 662)).

Response: Respondents object to this proposed finding because Complainants’ assertion is misleading and mischaracterizes the evidence because: a) the document cited is one of several sheets showing decals issued for the calendar year of 2007. (Decal Permit Information for 2007 (Resp. App. Tab No. 74 at p. 001951). Complainants have not cited any evidence to suggest that the vehicles registered in 2007 were used by this Port user in the years before or after this registration. b) Complainants have not cited any evidence to indicate, which of the registered vehicles accessed the Terminal at any given time.

114. Between January 1, 2008 and June 30, 2014, this hotel accessed the Cruise Terminal 8,167 times, each time being charged an Access Fee of only \$10.00. (Invoices – Galveston Wharves (San Luis Hotel) at BOT 016954 – 017031 (ALJ App. 663)).

Response: Denied. The San Luis Hotel accessed the Cruise Terminal 8,033 during the time period given. Complainants have arbitrarily picked the time period of January 1, 2008, through June 30, 2014, however, The San Luis has been paying access fees since May of 2005. (Invoices—Galveston Wharves (San Luis Hotel) at BOT_016922-016953 (Comp. App. 663)).

115. Between January 1, 2008 and December 31, 2013, the Wharves Board recorded 283 accesses by buses to the Cruise Terminal. (Clear Lake Shuttle Bus Access Fees at BOT 017260 – 69 (ALJ App. 1766), Royal Carriages Access Fees at BOT 017402 – 04 (ALJ App. 1908); *see also* Summary – Cruise Terminal Users Invoiced for Access Fees. (ALJ App. 769)).

Response: Denied. Respondents object to Complainants Certificate of Summary as evidence because it was prepared by Complainants’ counsel’s legal assistant and a cursory review of the summary shows it to be inaccurate. Respondents object to the term “accesses by buses” as overbroad and undefined. Complainants improperly assume that all vehicles

used by Clear Lake Shuttle and Royal Carriage are “buses” under the tariff and should be charged \$50.00 per trip. Complainants are attempting to mislead the Judge to believe that these companies only utilize buses, without any foundation or evidence of the same. In fact, most of these companies utilize several different types of vehicles, including, limousines, courtesy sedans, shuttle buses (that would seat up to fourteen persons and thus be charged \$10 access fee). As an example, one of the companies cited by Complainants, Royal Carriages, registered various capacity vehicles, including town cars and vehicles with seating capacities of as little as three people and as many as 28 passengers. 2007 Decal Permit list (Resp. App. Tab No. 74 at p. 001951). The company Merlo Limousines, although named a limousine company, also utilizes buses and vehicles with less than fifteen person capacity in its fleet. (Comp. App. 1878, pgs. 1883-1884). Complainants have not cited any evidence to indicate, which of the various limousines and shuttle bus companies registered vehicles accessed the Terminal at any given time for which they were invoiced during the above stated period. Subject to the foregoing objections, Respondents admit that Clear Lake Shuttle and Royal Carriages were billed for 283 accesses to the terminal during that period. However, Complainants review of the invoices is again inaccurate. As an example, Complainants fail to include Lone Star charges during the same period, which were more obviously bus charges at \$50 per trip. (Comp. App. 1871, pg. 72-73, BOT_017364-65).

116. Twelve of those 283 were charged \$50.00 per Access/Trip, 271 were charged only \$10.00. *Id.*

Response: Denied. Respondents object to Complainants Certificate of Summary as evidence because it was prepared by Complainants’ counsel’s legal assistant and a cursory review of the summary shows it to be inaccurate. Subject to the foregoing objection, please see response to Proposed Finding No. 115. Respondents admit that of the 283 trips charged to Clear Lake Shuttle and Royal Carriages during this period, Royal Carriages was billed twelve trips at \$50 each, while Clear Lake Shuttle was billed for 271 trips at \$10 a trip. There is no evidence that the Clear Lake Shuttle vehicles that accessed the terminal during this period were buses versus shuttles or limousines with a capacity of fourteen or less, which would be charged \$10 per trip. *Id.*

117. In 2014, Respondents recorded 274 accesses to the Cruise Terminal by limousines. (Summary – Cruise Terminal Users Invoiced for Access Fees) (ALJ App. 769); *see also* Abiding Limo Access Fees at BOT 017192 – 93 (ALJ App. 1699), Action Limo Access Fees at BOT 017194 – 201 (ALJ App. 1702), AIM Limo Access Fees at BOT 017206 – 10 (ALJ App. 1714), American Standard Limo Access Fees at BOT 017213 – 14 (ALJ App. 1721), Avanti Transport Access Fees at BOT 017223 – 27 (ALJ App. 1731), Best Limo Access Fees at BOT 017228 – 30 (ALJ App. 1736), Blackhorse Limo Access Fees at BOT 017233 – 43 (ALJ App. 1741), Cheap Town Car Limo Access Fees at BOT 017248 – 54 (ALJ App. 1756), Colony Limo Access Fees at BOT 017278 – 81 (ALJ App. 1786), Devine TownCar & Limo Access Fees at BOT 017297 – 303 (ALJ App. 1805), Envoy Executive Limo Access Fees at BOT 017308 – 16 (ALJ App. 1816), Galveston Limo Access Fees at BOT 017336 (ALJ App. 1831), Gemini Limo Access Fees at BOT 017341 – 43 (ALJ App. 1849), Gulf Coast Limo Services Access Fees at BOT 017347 – 54 (ALJ App. 1855), Lonestar Executive Limo Access Fees at BOT

017359 – 62 (ALJ App. 1867), Merlo's Limo's Access Fees at BOT 017370 – 87 (ALJ App. 1878), Reliance Limo & Town Car Access Fees at BOT 017397 – 99 (ALJ App. 1905), South Houston Limo Access Fees at BOT 017414 – 24 (ALJ App. 1922), Superior Limo Access Fees at BOT 017438 – 52 (ALJ App. 1946), Z Limo Services Access Fees at BOT 017462 – 70 (ALJ App. 1970)).

Response: Denied. Respondents object to Complainants Certificate of Summary as evidence because it was prepared by Complainants' counsel's legal assistant and a cursory review of the summary shows it to be inaccurate. Please see Respondents' response to Proposed Finding of Fact No. 115 above. Respondents' object to this proposed finding as it is duplicative of Proposed Finding of Fact No. 109. Subject to the foregoing objection, please see Respondents' response to Complainants' Proposed Finding of Fact No. 109.

As an example, one of the companies cited by Complainants, Royal Carriages, registered various capacity vehicles, including town cars and vehicles with seating capacities of as little as three people and as many as 28 passengers. 2007 Decal Permit list (Resp. App. Tab No. 74 at p. 001951).

118. Additionally, in 2014, the Wharves Board recorded 385 accesses to the Cruise Terminal. (Summary – Cruise Terminal Users Invoiced for Access Fees) (ALJ App. 769); *see also* AFC Corporate Transportation Access Fees at BOT 017203 – 05 (ALJ App. 1710), Clear Lake Shuttle Bus Access Fees at BOT 017270 - 77 (ALJ App. 1766), Daisy Tours & Conventions Access Fees at BOT 017294 – 96 (ALJ App. 1801), Finesse Transportation Access Fees at BOT 017318 (ALJ App. 1825), Galveston Limo Access Fees at BOT 017336 (ALJ App. 1831), Garcia Garcia Access Fees at BOT 017338 (ALJ App. 1845), Gaten Adventures Access Fees at BOT 017340 (ALJ App. 1847), Gotta Go Trailways Access Fees at BOT 017345 – 46 (ALJ App. 1852), J&J Tours Access Fees at BOT 017357 – 58 (ALJ App. 1863), Merlo's Limo's Access Fees at BOT 017371 – 77 (ALJ App. 1878), Primavera Access Fees at BOT 017390 – 91 (ALJ App. 1896), Royal Carriages Access Fees at BOT 017405 – 13 (ALJ App. 1908), Transportation Unlimited Access Fees at BOT 017454 – 55 (ALJ App. 1961), Western Motorcoach, Inc. Access Fees at BOT 017457 (ALJ App. 1964), Wynn Coaches Access Fees at BOT 017459 – 61 (ALJ App. 1966)).

Response: Denied. Respondents object to the term “accesses” as overbroad and undefined. Please see Respondents' response to Proposed Finding of Fact No. 115 above. Respondents object to Complainants Certificate of Summary as evidence because it was prepared by Complainants' counsel's legal assistant and a cursory review of the summary shows it to be inaccurate. Respondents object to the term “accesses by buses” as overbroad and undefined. The invoices cited by Complainants include charges for 434 trips.

119. The Wharves Board justified the 261% increase in Complainants' Access Fees, which took effect on July 1, 2014, based on their desire to ensure “. . . the private parking lots [like Complainants'] pay a more fair share of the [\$1.5M] in expenses.” (Audio Transcription of Mierzwa Interview on 5/19/14, at p. 6 (ALJ App. 762)).

Response: Objection. The proposed finding implies that the Port was seeking to have Complainants and only Complainants pay an increased fee to “pay their fair share.” The actual statement in the transcript states that all users were reviewed in this process:

The feeling of the board of trustees was they wanted to see the private parking lots and the other entities that are accessing the cruise terminal pay a more fair share of these expenses which the Port of Galveston has been paying, essentially, the difference between what we get from the cruise lines and what the delta is we'll say for the expenses the one and a half million.

Mierzwa Interview at p. 6:5-12 (Comp. App. 764). Respondents object to this proposed finding as irrelevant since the Tariff effective July 1, 2014, is no longer in place and no longer at issue. Wharves – Tariff Circular No. 6 (Item 1 11) revised September 22, 2014, (Resp. App. Tab. No. 6 at p. 000387). When the Tariff effective July 1, 2014, was rescinded in September of 2014, all moneys collected under this Tariff were refunded. Affidavit of Mark Murchison ¶19 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Michael Mierzwa ¶32 (Resp. App. Tab. No. 75 at p. 002075); Wharves—Regular Monthly Meeting Minutes, September 22, 2014, BOT_015654 (Resp. App. Tab No. 87 at p. 002618)

120. Respondents have historically failed to charge and/or collect Access Fees from a material percentage – if not a majority – of commercial vehicles that have accessed the Cruise Terminal since the 2006 Tariff came into force. (Certificate Summary Certificate Summary (ALJ App. 768), Summary - Cruise Terminal Users Invoiced for Access Fees (ALJ App. 769)); see also (Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008) (ALJ App. 35); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009) (ALJ App. 38); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2010) (ALJ App. 41); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2011) (ALJ App. 44); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2012) (ALJ App. 47) ; Galveston Wharves Historical Detailed Trial Balance, Access Fees (2013) (ALJ App. 50); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2014) (ALJ App. 54); Clear Lake Shuttle Bus Access Fees at (BOT 017260 -69); and Royal Carriages Access Fees at (BOT 017402 -04).) Between January 1, 2008 and December 31, 2013, the Wharves Board did not charge a single limousine an Access Fee. (Invoices – Galveston Wharves (Avanti Transportation) (ALJ App. 1731)).

Response: Denied. Respondents object to this proposed finding of fact because as written, it is compound, vague and overbroad. The phrases “failed to charge” and “if not a majority” are undefined and vague. Please see Respondents’ response to Proposed Finding of Fact No. 115 above. Subject to the foregoing objections, Complainants have not cited any evidence to support their allegations that vehicles were not charged to access the vehicles.

Subject to the foregoing objections and without waiving these objections, prior to 2008, the Wharves invoiced limousines accessing the Cruise Terminal. However, with a few exceptions, limousines are typically from out of town and access the terminal irregularly; some accessed the Cruise Terminal two times a week while others did so two times a year.

Compared to local users, such as the Complainants, their overall access to the Cruise Terminal appears to be quite small. Historically, it has been difficult to get limousines to pay these fees. Attempting collection efforts for such small fees has not been economically feasible. On September 13, 2008 Hurricane Ike made landfall on Galveston Island and devastated the island. This storm also disrupted Cruise Terminal operations for a while. When operations resumed and passengers returned to the Terminal billing for limousines was not resumed. The employee at the gate stopped keeping track of limousines and the billing stopped. Following the work of the Access Fee Study Group, the Wharves determined once again to invoice and collect Access Fees from limousine companies. Some companies have ceased to service the Terminal because of this. Others have not paid. The Wharves pulled the permit for one such company in 2015 and this company began to try to unload passengers on Harborside Drive, adding to congestion and traffic jams. That situation is ongoing. See Affidavit of Colony Limo ¶3, Resp. App. Tab. No. 85 at p. 002585; Affidavit of Mark Murchison ¶¶24-27, Resp. App. Tab No. 77 at p. 002086-002087).

Respectfully submitted,

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GALVESTON PORT FACILITIES CORPORATION

CERTIFICATE OF SERVICE

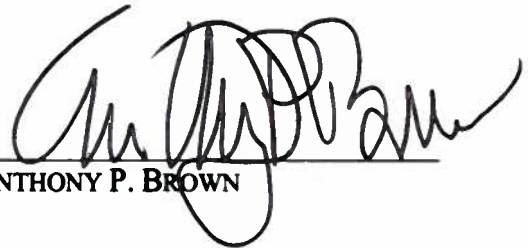
I hereby certify that I electronically filed this document on this 15 day of June, 2015, and that a true and correct copy of the foregoing was served on all counsel of record *via* certified mail – return receipt requested and email, as indicated below:

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